SOCIAL PROCESS IN HAWAII

Special Issue

Social Control in Health and Law

Jeffrey J. Kamakahi
Deanna B. K. Chang
Guest Editors

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Volume 34, 1992

Department of Sociology
University of Hawaii at Manoa

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Foreword

This special issue on Social Control in Health and Law in Hawaii edited by Jeffrey J. Kamakahi and Deanna B. K. Chang continues to reflect on some basic and valued practices established by the founders of *SOCIAL PROCESS IN HAWAII*. Students, both undergraduate and graduate, have been key to the development and publication of specific issues. The student status of the co-editors at the inception of the project is indicative of the value placed on student participation in developing and completing publication work. The recipient of the Bernhard L. Hormann Prize, Paul Shaner III, is recognized in a work published in this issue. Without the painstaking editorial and technical assistance of Associate Professor Michael Weinstein, Keith Nagai, and Lloyd J. Kuniyoshi, the guest editors would not have been able to move the project along to completion. We all owe a great debt of deep appreciation for the work done.

The focus on how health and law are organized and administered over time and in Hawaii today also is made within a comparative and general framework. Comparative work in other settings can enrich the growth of knowledge, perspectives, and methods and techniques in the study of social relations and persons across diverse ethnic and social contexts. Such contrasts will continue to uncover the more general from the variant aspects of social life in different social settings.

Kiyoshi Ikeda, Ph.D.
Executive Editor

Preface

This volume of *Social Process in Hawaii* presents a sample of the wide range of topics and approaches to the study of social control in Hawaii undertaken by past and present faculty and students of the Department of Sociology. In their "Introduction" the guest editors discuss the origins of the concept of social control and its changing scope and meaning through time. The first five chapters of the volume deal with current problems in Hawaii while the last three concern 19th century Hawaii. Chapter 6 is a transition between the two sets.

In "Risk Assessment and Rearrest on Probation" Keith Nagai and Gene Kassebaum investigate the degree to which the Wisconsin Model predicted the future arrests of probationers in Hawaii. Then they find the extent to which the often found differences based upon gender, ethnicity and caseload size disappeared when the risk scores were taken into account.

David Heaukulani's "Critical Mass: Observations on Prison Overcrowding in Hawaii" analyses the actual contributions to Hawaii's prison overcrowding made by a variety of the popularly attributed reasons, e.g., more severe statutes, longer minimum sentences.

Deanna B. K. Chang, in "A Domestic Violence Shelter: A Symbolic Bureaucracy," looks at what happened organizationally within a small program for abused women when that program was incorporated into a larger organization.

"Patient Consent: Issues in the Legal Regulation of a Client-Professional Relationship" presents Eldon Wegner's investigation of the asymmetrical character of the doctor-patient relationship in mastectomy-cancer consultations and the contradictory dimensions of social control in that dyadic relationship.

Albert B. Robillard's "A Social Semiotics of Nursing" argues that the shortage of nurses is the consequence of the manner in which modern capitalist society controls the social reality of nursing by controlling the definition of the profession. The Hawaii case is a manifestation of the global perspective.

Jeffrey J. Kamakahi's "Hospitals and Social Control During Hawaii's Kingdom Era" is an interesting transition to the articles dealing strictly with 19th century Hawaii. Making use of data on hospitals in Hawaii during the period of the kingdom, he develops a general model for simultaneously examining the social controls within such institutions and the social controls of these institutions from outside.

Peter J. Nelligan and Harry V. Ball, in "Ethnic Juries in Hawaii: 1825-1900," describe the establishment and the termination of the institution of the ethnic jury system in Hawaii and the relationship of this system to questions of sovereignty.

In "Juvenile Commitments Under the Kingdom: 1865-1886" Lloyd J. Kuniyoshi and Harry V. Ball describe the social characteristics of the youngsters committed to Hawaii's first reformatory and the grounds for their commitment.

Paul H. Shaner III's "Gambling, Lotteries and the Law in 19th Century Hawaii" describes the social significance of and the social conflict over the gambling issue in the periods of the Kingdom, the Provisional Government, the Republic and the first years after annexation by the United States.

The Editors
December, 1991

Introduction

JEFFREY J. KAMAKAHI AND DEANNA B. K. CHANG

The notion of social control has enjoyed a central place in sociology (Wolff, 1964; Pitts, 1968). Although the term has recently come to be narrowly associated with the intentional employment of sanctions between actors, it has been the position of this publication that the concept extends much beyond that. Here, social control has been used in very broad fashion to refer to socially produced parameters which contextualize and situate social activity.

Social control does not refer just to a particular act or relation, but rather to particular acts or relations within a larger complex of social and material circumstances (see Duncan, 1962). For example, the initial employment of sanctions between agents[1] implicates an entire array of social processes. There is an implied differentiation of acting agents and supporting agents. The identity of the "recipient" and the "sanctioner" must be elaborated within some meaningful context. The motivation behind both acts of transgression and acts of sanctioning must be placed within some discursive social order. Concomitantly, the sanctioning agent must be legitimized and empowered through some social mechanism. Valences for the act of transgression and their appropriate sanctions must be "determined." The sanction itself must be presumed to vilify the morality of the social order by the sanctioner; and, at the same time, the sanction must be seen as punishment for the recipient. The sanction itself, then, is but a small part of the complexity of "the act."[2]

As viewed here, social control is a sensitizing concept[3] which can be employed at any level of analysis because every act indexically implicates other social relations. Furthermore, social control is not a static external phenomenon, it is a non-recursive process which cannot be isolated and/or located in any particular mediative level. In other words, we can speak of instances of social control without ever being able to definitively pinpoint its ultimate "source."

A montage of other sociological concepts can be said to overlap the broad parameters of the concept of social control as used in this essay. Concepts such as power and authority (see Weber, 1946; Homans, 1961; Parsons, 1964), social order and social system (see Durkheim, 1954; Duncan, 1962; Garfinkel, 1967; Foucault, 1971; Strauss, 1978), political-economy (Marx and Engels, 1947; Baudrillard, 1981), culture (Bourdieu and Passeron, 1977), and ideology/knowledge (Berger and Luckmann, 1967; O'Neill, 1989), among others, may be said to permeate the domain of social control. The notion of social control suggests that there are socially constructed significations associated with all practical social actions; and that these "taken for granted" assumptions are often accepted a priori. In essence, our acts only "make sense" viz-a-viz some set of socially constructed parameters which may be said to partially

control us as much as we control them. This latter aspect of social control is perhaps most conspicuous in writings which question or highlight "the order of things" (see Mead, 1934; Foucault, 1971; Baudrillard, 1975; Giddens, 1981).

SOCIAL CONTROL IN HEALTH AND LAW

The substantive areas of the Sociology of Health and Illness (Medical Sociology) and the Sociology of Law and Deviance are arenas in which the broad conceptions of social control merge with the purposive levying of sanctions in practice. Pitts (1968) points to the strong tradition of social control studies in the two substantive fields - in which the specialties themselves may be outgrowths of the concept:

> Social control was once a concept which covered many areas that later became independent specialties - areas like penology, medical sociology, and the sociology of law. (p. 394).

Many theorists have explicitly or implicitly demonstrated the nexus between the substantive specialties. Parson's (1951) notion of the sick role, for example, can be seen as a form of temporary, but legitimized, deviance. Once legitimacy is removed, however, the condition no longer enjoys the status as "sickness" but as "willful deviance." Foucault finds that the same "theory of the body" comes into play whether we talk about the development and maintenance of prisons (1977), mental health institutions (1971), or medical clinics (1973) as discourses of social domination. Goffman (1962) classifies as examples of his ideal type "total institutions": prisons, mental hospitals, and leprosaria. In the study of mental health institutions, the distinction between what is medical and what is legal often collapses entirely (Szasz, 1963).

This journal issue also conceives of the areas of sociology of health and illness and sociology of law and deviance to be intermeshed. The substantive interest in health and illness invariably refers to legal/political-economic/normative orders with regard to medical expertise and authority (i.e. legitimation), the organization of heath sectors (i.e. institutionalization), and the maintenance of social status (i.e. structural reproduction). The passage of legislation, the allocation of government monies, the existence of health insurance schemes, the certification of health practitioners, and so on are all "legal" aspects of health.

Likewise we find there to be a concern with torts (i.e. the assessment of injury or harm) underlying the sociology of law and deviance. Both criminal and civil law assesses the degree to which injury or harm, whether to individuals or to an amorphous aggregate (e.g., "the people", "the State"), has transpired.

The parameters of retribution or punishment are socially constructed in light of the amount of harm perpetrated as well as some notions of the limits of acceptable treatment of deviants. Standards of confinement and punishment have changed as have the historicity of ideas of health and illness that have been linked to "cruel and unusual punishment," "sub-human" conditions, and so on.

The demarcation between deviance and illness, between responsibility and happenstance, between punishment and rehabilitation/treatment, and so forth are indeed tenuous and cultural. These cultural dialectics, though, seem to hinge on the signified congruity of health, equilibrium, normality and legality. These are the background assumptions of functionalism's "needs" as well as the practical "taken for granteds" in the structuralist notions of reproduction. The cultural dialectics also provide the foundation for critiques of functionalist and structuralist orientations; where the focus has been to question the static status quo and its validity viz-a-viz underlying signifieds and signifiers.

DISCUSSION

Since the construct of social control was our point of departure, we can say that the articles contained within this issue applied the construct toward the analysis of substantive concerns. This allowed for a wide range of interpretations of the concept as well as a variety of theoretical orientations and methodologies.

For some, the open-endedness with which the editors have chosen to treat the notion of social control may be disconcerting. That is, some might be more comfortable with a specific "real" definition or exhaustive set of denotative examples. Such a stance, though, would have contradicted our intent and resulted in our greater social control in the form of arbitrarily setting (unnecessary) communicative parameters. Our point was to discuss social control and not to needlessly enhance it!

We were tacitly addressing Pitts' (1968) contention that the seeming lack of interest in the concept of social control was "rooted in the structural conditions of sociology as an intellectual enterprise" (p.394). The articles in this journal issue have demonstrated that social control is an integral part of sociological work.

We conceive of social control as being among the fundamental organizing principles of sociology. To live in a socially constructed world is to be permeated by limiting practical assumptions and, perhaps more importantly, to reproduce them in the course of everyday activities. This is not to say that the world is ontologically pristine and/or that our cosmology is unitary and

unambiguous. On the contrary, there exists, at any given time, any number of contradictory discourses and codes. One underlying implication of social control is that we are both willing and unwilling co-participants in existing discursive orders: many of which are opaque. In other words, we cannot "step out" beyond our limiting assumptions to critique them without bias.

What, then, is social control? Is it a discourse? Or a structural relation? A levying of sanctions? The list of possibilities is endless. In the broadest sense, social control is a theory of limits. As a theory of limits, it serves to demarcate the parameters of the "real," the legitimate, the acceptable, the moral, and so forth from their "pseudo" counterparts. It does so not just as a legitimizer of those limits, but possibly as a critique of them.

When one studies social control, ultimately one is faced with questioning the validity of the limits imposed. This does not mean that the critique is itself without limits, but that the background assumptions are themselves problematic. Ironically, to critique social control means also to participate in some form of social control: employing the background assumptions of some existing discourse.

One dilemma that we face is that the same positive act is insufficient in invoking a unitary interpretation of social control. For example, we may conceive of the apprehension of a person participating in a sit-in by the police as constituting harassment, a curtailment of the protester's freedom of speech, a proper disposition of a public nuisance, a show of coercion by the "establishment," the legitimate use of authority by a public servant (i.e. the police officer), and so on. The same behavior, even though seen as an instanciation of social control, does not guarantee a consensus of assessment. The assumptions of the assessment itself are latent aspects of an implicit, discursive social control. Thus rests our apprehension in accepting a purely behavioral iconic definition of social control: because often our "limits" are nested within even broader and diffuse limits.

Can such a diffuse construct be useful in sociology? After all, we have argued that social control is intimately intermeshed with other sociological constructs: having no exclusive domain in that regard. Also, we have proposed that social control is a decentered phenomenon; one whose "source" cannot be definitively located. In addition, we were unable to provide a "real" definition or an exhaustive set of denotative examples of social control. And finally, it was noted that social control is an interpretive stance of "limits" within limits.

Social control, we argue, is such a fundamental organizing principle in sociology, that it's status as a primitive, sensitizing concept is to be preserved.

Attempts to restrict social control to only certain types of situations serves to bastardize the construct and to establish further communicative controls within the parameters of established discursive codes. Reductionism of the social control construct to particular behavioral acts or to pre-scripted "motivations" only serves to reproduce limits rather than to identify, question and/or critique them. Blanket explanatory schemes of social control run the risk of reifying background assumptions of one discourse and imposing them upon another.

Our suggestion is to allow the theoretical orientations of practitioners to identify instances of social control and to explicate the specific and situationally relevant mechanisms and discursive elements of that application. In these circumstances, the concept of social control can be an organizing principle, a sensitizing concept, and still maintain its flexibility for various research applications.

NOTES

1. We are using the term agent as opposed to actor because the connotation of the former is that the agent is a participating mediator that produces and reproduces social "reality" rather than being simply a facade for "pre-determined," scripted scenes.

2. The definition of what constitutes "the act" is a matter for serious theoretical interest and practical interpretation. Mead's generalized concern with the temporality and meaning contexts, Giddens' interest in structuration, and O'Neill's theorizing on the "communicative body" are among the myriad of sociological works that point out parameters in defining social "reality."

3. The term "sensitizing concept" is used in Blumerian fashion to refer to abstract constructs that are not easily definable but which heighten one's awareness toward certain aspects of our perceptual field.

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1 Risk Assessment and Rearrest on Probation[1]

KEITH NAGAI AND GENE KASSEBAUM

THE PROBLEM

Risk assessment is the attempt to avert possible future adverse events by making predictions from correlates of the anticipated event. The risk posed by criminal offenders may be in terms of the magnitude of the possible loss (the "stakes" involved in risk prediction) or the probability of some event (the "odds" involved). For example, a decision involving a repeat of writing a bad check is low stakes but high odds. A decision involving a possible murder or rape is high stakes even though low odds. Risk assessment in probation is the effort to classify probationers on the likelihood of committing an offense while in the community. By focusing on risk, current public and legislative emphasis on community protection rather than an earlier priority on personal reformation is in the forefront of probation management.[2] This study reports risk classification on adult probation data collected in Honolulu.

Risk assessment is done by "The Wisconsin Model," a standardized scoring of eleven questions about the offense, prior criminal record, successful adjustment to conventional life expectations and record of drug and alcohol problems. After a classification, supervision is allocated to the probationer proportionate to risk. By such differential allocation of surveillance, risk is managed. But is risk management successful? We approach this by showing that risk level is correlated with rearrest in an adult probation population. Risk level is a predictor after effects of gender and ethnicity (each long known to be predictors of recidivism) are controlled. We then see whether probation officer caseloads composed so as to allocate more supervision time to higher risk probationers still show the correlation between risk level and recidivism. They do. Risk level continues to correlate with rearrest. The effects of risk, gender and ethnicity are summarized in a multivariate analysis at the end.

RISK MANAGEMENT IN PROBATION SUPERVISION

The Wisconsin Model's strengths lie in its completeness, its simplicity, its utility to management, and its attention to details which if overlooked could obstruct risk management. The Wisconsin model has four basic components: risk and needs assessment; case management classification for appropriate casework strategy; a management information system; and a work load deployment and budgeting plan (Baird 1981, also Wright, Clear and Dickson 1984).

The use of classifications in corrections is not a new development. The movement from punishment to rehabilitation in corrections prompted the use of classifications for the purpose of gaining an estimate of probable response to treatment. However, classification appears to be more than an instrument to measure the client's response to selected treatment plans. It serves as a management information tool designed to collect information for evaluation and planning purposes. The case management classifications must be evaluated in relation to utility and not only in the reduction of criminal activity. The system works if the administration, officers, and staff come to a better understanding of the purpose of the classification system and intended use. This allows probation officers to make independent decisions based on their own findings through interviews with their clients, to make the appropriate referrals to service agencies, to establish better communications with their supervisor. This will, in the long run, contribute to the probation officer's confidence, own job performance and satisfaction and allow for the system to flexibly redefine its criteria to effectuate significant improvements in community corrections (Kratcoski 1985). Correctional administrators, treatment staff, and professional association leaders have long maintained that reducing case load size will enhance the treatment and handling of clients sentenced to probation. Several studies show that reduced case load size in probation departments are effective. Others, such as the SIPU studies in California, showed caseload size by itself is not correlated with reduced recidivism (See Adams 1976). The probation agency studied had recently reorganized officer workloads according to risk management and stipulated requirements for different levels of supervision to different risk classes. The idea was that higher risk probationers should receive more supervision than lower risk probationers.

Researchers still do not know what the ideal size of an officer's case load ought to be. The President's Commission of Law Enforcement and Administration of Justice concludes, caseload size ought to be 35. This, however, is far from reality because caseloads are much higher in all regular probation offices. Caseload size remains an open question. Law makers continue to operate as though the relationship between caseload size, work and performance is understood and taken for granted. But interrelationship among other variables influences the theoretical framework of probation supervision through manipulated caseload size, thus affecting client's and probation officer's performance (Adams & Vetter 1976).

The study reported here examines only one aspect of the introduction of the risk classification/case management model in adult probation division. We review risk classification in relation to rearrest, looking at the effects of gender, ethnicity and caseload on this relationship.

METHODS OF DATA COLLECTION AND ANALYSIS IN THE PRESENT STUDY

The data were collected at the Adult Probation Division in Honolulu, Hawaii. The original data set contained the client's risk and needs assessment scores and the leading charge on which the client was sentenced to probation during the fiscal year 1985/86. The total sum of the risk and need scores are each transformed into intervals that determine the client's risk classification and adjustment program. For this study, only the risk scores were used (The need items were excluded from the analysis because they tend to overlap with the risk items, and total scores for risk and need are highly correlated). A reassessment is done 6 months after the initial assessment. After one year has elapsed, the client is reassessed every year until the sentence expires. Following the expiration of the probation sentence, a final reassessment is done.

The risk score variables were selected based on characteristics demonstrating a probability that the client will likely fail the conditions of probation. All of the risk item scores (derived from the client's response to the interview plus the official record) are weighted. Those items that predict a greater risk are given a larger weighted score.

Cases belonging to officer case loads of 100 or larger (the largest was 172) were selected for study. However, for some probation officers, a few of their cases dropped out, because they had been sentenced on "Deferred Acceptance of Guilty Plea" which results in a dismissal upon successful completion of probation. A total of 1130 cases made up the final data base for caseload study.

The total number of points scored on the client's assessment/reassessment sheet, made up the risk class. The actual number of points a client receives depends on how the client responds to the interview by the probation officer. Points are scored for each item. The distribution of total scores is divided into three categories. The Adult Probation Division classifies probationers into 3 risk classifications of minimum, moderate and maximum.

Table 1 Percent Distribution Risk Category of Probation Client

Score/Risk Cat.	Number	Percent
0-10 Minimum	711	62.9%
11-20 Moderate	319	28.3%
21+ Maximum	100	8.8%
Total	1130	100.0%

The Client's Sex

Normally, the client's sex is not recorded in the Wisconsin model. The data shows more males than females sentenced to probation. The final data set contained 891 males and 231 females.

Table 2 Percent Distribution Sex of Probation Client

Prior	Number	Percent
Male	891	78.8%
Female	239	21.2%
Total	1130	100.0%

The Client's Ethnicity

The data indicate a likelihood of certain ethnic groups being sentenced to probation and being rearrested more frequently than other ethnic groups. In the data set there were 72 Blacks, 139 Filipinos, 312 Hawaiians, 126 East Asians, 66 Samoans, 312 Whites, 82 Others, and 21 Unknowns.[3] East Asians and Filipinos were combined to form the category "Asians." Hawaiian/part Hawaiian, Samoans, and "Other" were combined to form the "Pacific Islander" category. There are fewer Asians and more Blacks and Hawaiian/Pacific Islanders than would be expected from the general population of the State of Hawaii.

Table 3 Percent Distribution Ethnicity of Probation Client

Ethnicity	Number	Percent
Whites	312	27.9%
Blacks	72	6.5%
Asian	265	23.7%
Pacific Isle.	460	41.3%
Unknown	7	0.6%
Total	1116	100.0%

Missing = 14
Total = 1130

Recidivism Data

The third part of the research record consisted of measures of recidivism. The term recidivism for these probationers is defined as any recorded criminal activity from 7/1/86 to 6/30/88, a period of two years. The capture date for criminal activity was extended to two years. There were 4 variables collected from the Offender Based Transaction System (OBTS) that were coded to measure recidivism activity. They were;

1. The number of arrest episodes by **tracking number**[4]
2. The most serious arrest charge
3. The disposition of the most serious arrest charge
4. The severity of the most serious arrest charge

In this paper, only the number of rearrest episodes is discussed. Table 4, represents the percent distribution of risk classification by the number of rearrest episodes. Nearly all of those who were never rearrested (82.8%) came from the minimum risk classification. Repeated rearrest (2-3 times) increased as risk classification increased. Those who were rearrested 4+ times were much more likely to be classified as maximum or moderate risk rather than minimum risk.

Table 4 Percent Distribution of Risk Classification by The Frequency of Rearrest Episodes

	The Frequency of Rearrest Episodes				
Risk Category	No Epis.	1 Epis.	2-3 Epis.	4+ Epis.	Total
Minimum N=711	82.8%	10.4%	4.4%	2.4%	100.0%
Moderate N=310	62.4%	17.2%	12.2%	8.2%	100.0%
Maximum N=100	57.0%	16.0%	10.0%	17.0%	100.0%

N=1130

Tables 5 and 6 represent rearrest by risk classification controlling for sex. The percent of both males and females never rearrested decreases as risk classification increases.

There were 239 females and 891 males in the study. For each gender, the probability of rearrests is to some extent measured with risk level. For men, there are more rearrest episodes as risk classification moves from minimum (80.7%), to moderate (56.9%) and maximum (57.5%). Those with 1 rearrest episode appeared frequently in the moderate (19.3%) category as opposed to the maximum (16.0%) category. Likewise, those who fell in the 2 - 3 rearrest

episodes category reported similar findings with 4.7% classified as minimum, 14.5% classified as moderate, and 9.5% classified as maximum risk. Those who reported 4+ rearrest episodes increased as risk classification increased. Only 2.6% of the minimum risk probationers had 4 or more rearrests. Of those who were classified as moderate, 9.3% had 4+ rearrests, while the maximum risk category, 17.0% had 4+ rearrest episodes.

Table 5 Percent Distribution of Risk Classification by The Frequency of Rearrest Episodes Controlling For Sex = Male

	The Frequency of Rearrest Episodes				
Risk Category	No Epis.	1 Epis.	2-3 Epis.	4+ Epis.	Total
Minimum N=549	80.7%	12.0%	4.7%	2.6%	100.0%
Moderate N=248	56.9%	19.3%	14.5%	9.3%	100.0%
Maximum N=94	57.5%	16.0%	9.5%	17.0%	100.0%

N=891

Table 6 Percent Distribution of Risk Classification by The Frequency of Rearrest Episodes Controlling For Sex = Female

	The Frequency of Rearrest Episodes				
Risk Category	No Epis.	1 Epis.	2-3 Epis.	4+ Epis.	Total
Minimum N=162	90.1%	4.9%	3.1%	1.9%	100.0%
Moderate N=71	81.7%	9.9%	4.2%	4.2%	100.0%
Maximum N=6	50.0%	16.7%	16.7%	16.6%	100.0%

N=239

Sometimes it is held that women are sentenced more leniently than men, that is, women are more likely to get probation than confinement. Our data do not support that view. Women on probation have lower risk scores than men on probation. For supervision purposes, the risk measurement predicts recidivism for women as well as it does for men.

Table 7, represents the percent distribution of risk category by sex of the client. The percentage of females who are classified as minimum risk is greater than for males. Likewise, the percentage of females who are classified as maximum risk is lower than for males. Males are arrested more frequently for violent types of crimes. Probably for this reason males have higher risk classifications than females.

Table 7 Percent Distribution of Sex by Risk Category

	Risk Category			
Sex	Minimum	Moderate	Maximum	Total
Male N=891	61.6%	27.8%	10.6%	100.0%
Female N=239	67.8%	29.7%	2.5%	100.0%

N=1130

Ethnicity, Gender, Recidivism and Probation Supervision

Ethnicity is not one of the variables for calculating risk in the Wisconsin Model. The ethnicity variable is unacceptable legally and politically as a part of indication of risk control, but the data shows that there are differences across the various ethnic groups in the risk of rearrests (See Table 8).

Overall, Pacific Islanders are a higher percentage of higher-risk probationers, while the Whites and Asians have more moderate risk probationers and the Blacks have the highest proportion of low risk probationers and the lowest moderate and maximum risk probationers. These findings contrast with mainland figures and should be researched further as to possible interpretations on what accounts for the major differences. Violent offenders are more often sentenced to prison, and in Hawaii there are few black permanent residents, mostly young men in the military.

Table 8 Percent Distribution of Ethnicity by Risk Category

	Risk Category			
Sex	Minimum	Moderate	Maximum	Total
White N = 312	70.5%	22.4%	7.1%	100.0%
Black N = 72	77.8%	19.4%	2.8%	100.0%
Asian N = 265	69.1%	23.8%	7.1%	100.0%
Pac. Isle. N = 460	52.0%	36.0%	12.0%	100.0%
Unknown N = 7	71.4%	22.2%	6.4%	100.0%

N=1116 14 Missing Case.

*Chinese, Filipinos, Indo-Chinese, Japanese and Koreans make up the "Asian" category. Hawaiians, Samoans and Other make up the "Pacific Isle." category.

Tables 9, 10 and 11, show the distribution of rearrest episodes by sex, controlling for risk category. On the whole, more men than women are rearrested at least once within the 2 year period. The differences occur due to

arrest/rearrest and sentencing patterns that classify clients on the basis of the nature of the commitment offense. Fewer females receive a maximum risk classification as opposed to men. The likelihood of rearrest for women is much lower than it is for males. None the less, for both men and women, risk classification predicts rearrest.

Table 9 Percent Distribution of Sex by The Frequency of Rearrest Episodes Controlling For Risk Category = Minimum

	The Frequency of Rearrest Episodes				
Gender	No Epis.	1 Epis.	2-3 Epis.	4+ Epis.	Total
Male N=549	80.7%	12.0%	4.7%	2.6%	100.0%
Female N=162	90.1%	4.9%	3.1%	1.9%	100.0%

N=711

Table 10 Percent Distribution of Sex by The Frequency of Rearrest Episodes Controlling For Risk Category = Moderate

	The Frequency of Rearrest Episodes				
Gender	No Epis.	1 Epis.	2-3 Epis.	4+ Epis.	Total
Male N=248	56.8%	19.4%	14.5%	9.3%	100.0%
Female N=71	81.7%	9.9%	4.2%	4.2%	100.0%

N=319

Table 11 Percent Distribution of Sex by The Frequency of Rearrest Episodes Controlling For Risk Category = Maximum

	The Frequency of Rearrest Episodes				
Gender	No Epis.	1 Epis.	2-3 Epis.	4+ Epis.	Total
Male N=94	57.4%	16.0%	9.6%	17.0%	100.0%
Female N=6	50.0%	16.7%	16.7%	16.6%	100.0%

N=100

Gender continues to show a relationship to recidivism after controlling for Risk, but much diminished. Ethnicity differences virtually disappeared when risk measure is controlled. While ethnicity can be ignored if risk is taken into account, gender continues to show an effect, with women less likely to be rearrested than men even at higher measured risk levels.

Tables 12 through 14 show that rearrest differs more across risk categories than between ethnic groups. Compared with the low risk group, in which each ethnicity varied only between 79% and 89% never rearrested, moderate and maximum risk probationers cluster in the range from 53% to 64% rearrested.

Table 12 Percent Distribution of Ethnic Composition by The Frequency of Rearrest Episodes Controlling For Risk Category = Minimum

	The Frequency of Rearrest Episodes				
Ethnicity	No Epis.	1 Epis.	2-3 Epis.	4+ Epis.	Total
Asian N=183	80.3%	11.5%	6.0%	2.2%	100.0%
Whites N=220	86.8%	8.6%	2.3%	2.3%	100.0%
Blacks N=56	89.3%	5.4%	3.6%	1.8%	100.0%
Pac.Isle. N=239	79.1%	12.6%	5.4%	2.9%	100.0%

N=703 Missing = 8

Table 13 Percent Distribution of Ethnic Composition by The Frequency of Rearrest Episodes Controlling For Risk Category = Moderate

	The Frequency of Rearrest Episodes				
Ethnicity	No Epis.	1 Epis.	2-3 Epis.	4+ Epis.	Total
Asian N=63	57.1%	25.4%	11.1%	6.4%	100.0%
Whites N=70	64.3%	14.3%	17.1%	4.3%	100.0%
Blacks N=14	57.1%	14.3%	14.3%	14.3%	100.0%
Pac.Isle. N=166	63.3%	16.3%	10.2%	10.2%	100.0%

N=314 Missing = 5

Table 14 Percent Distribution of Ethnic Composition by The Frequency of Rearrest Episodes Controlling For Risk Category = Maximum

	The Frequency of Rearrest Episodes				
Ethnicity	No Epis.	1 Epis.	2-3 Epis.	4+ Epis.	Total
Asian N=19	52.6%	31.6%	-	15.8%	100.0%
Whites N=22	59.1%	9.1%	18.2%	13.6%	100.0%
Blacks N=2	100.0%	-	-	-	100.0%
Pac.Isle. N=55	56.4%	14.5%	10.9%	18.2%	100.0%

N=99 Missing = 1

Caseload, Risk and Recidivism

The purpose of this paper was to examine the workings of the Wisconsin Risk/Need assessment model and to see whether the distribution of caseloads balanced out on risk category to optimize probation officer's work performance.

Table 15 represents probation officer's work unit by risk category. The following tables are presented with the intention of showing the performance of the probation officer in terms of case load size, risk classification and recidivism.

Within caseloads, rearrest is predicted by the risk scores. Those in the minimum risk are less likely to be rearrested. As risk level increases, the percentage of clients rearrested increases. The moderate risk category seems to contain many repeat property offenders; previous violence puts probationers into the maximum risk category. The charge on which the probationers are rearrested indicates the need for intensive supervision of those classified as moderate and quite possibly, the maximum risk category.

Table 15 Percent Distribution of Caseload by Risk Classification of Those Rearrested

	Rearrested		Percent Rearrested by Risk					
Caseload	Percent	Total N	Minimum	N	Moderate	N	Maximum	N
1	21%	(92)	17.2	(58)	28.0	(25)	22.2	(9)
2	23%	(92)	19.7	(56)	31.5	(19)	23.5	(13)
3	32%	(101)	22.1	(77)	61.9	(21)	66.7	(3)
4	5%	(112)	4.6	(109)	50.0	(2)	-	(1)
5	28%	(95)	19.3	(36)	30.0	(40)	42.1	(19)
6	38%	(106)	26.3	(57)	43.0	(30)	63.2	(19)
7	27%	(67)	15.4	(13)	19.0	(42)	66.7	(12)
8	38%	(73)	23.9	(46)	65.2	(23)	50.0	(4)
9	34%	(103)	23.5	(68)	56.7	(30)	40.0	(5)
10	19%	(107)	10.5	(67)	27.8	(36)	75.0	(4)
11	19%	(80)	13.8	(58)	33.3	(21)	-	(1)
12	24%	(102)	19.7	(66)	36.7	(30)	-	(6)

N=1130

Even with presumably high contact hours in probation supervision, all caseloads showed larger percentage of rearrest in either moderate and maximum risk. Allocating of extra contact in the balanced caseloads does not eliminate higher probability for rearrest of persons in moderate or maximum risk categories.

A MULTIVARIATE ANALYSIS

These can be more tightly summarized in a weighted least squares method proposed by Grizzle, Starmer and Koch 1969. This yields a linear equation that minimizes the weighted residual sum of squares for the model.

Three independent variables (risk category, gender and ethnicity) were used as predictors to determine the probability of rearrest (See Table 16). The variable risk category was recoded "0" for low risk clients and "1" for moderate and maximum risk clients. The risk category variable is important because it determines the level of supervision for the client. The variable gender was recoded "0" for females and "1" for males. The variable ethnicity was recoded "1" for Pacific Islanders "0" for All Others. (Neither the gender nor ethnicity variables are used in the assessment or reassessment of the client. Gender and Ethnicity were included in the statistical analysis, along with risk category, to determine the independent effect these variables have on rearrest).

The dependant variable, rearrest episodes, was recoded as "0" for no rearrest and "1" for rearrested at least once. The three independent variables generate sub-groups ("samples") from the population. Sample 1 is made up of "low risk" clients, female and "Non Pacific Islanders." Sample 2 is made up of "low risk" clients, female and "Pacific Islander." Sample 3 is made up of "low risk" clients, male and "Other." Sample 4 is made up of "low risk" clients, male and "Pacific Isle." Sample 5 is made up of "high risk" clients, female and "Other." Sample 6 is made up of "high risk" clients, female and "Pacific Isle." Sample 7 is made up of "high risk" clients, male and "Other." Sample 8 is made up of "high risk" clients, male and "Pacific Isle."

The analysis of the individual parameters in the main effects model shows the estimated probability of not being rearrested diminishes by .20 from the intercept when risk category is included. Risk category has the largest effect on the study population, where at a .0001 probability, we can predict that .20 of those who are high risk (as opposed to those who are low risk) are likely to be rearrested. When gender is included in the model, the independent effect on the probability of not being rearrested diminishes by .13 for those who are male as opposed to those who are female. Finally, the independent effect of ethnic composition on the intercept shows that Pacific Islanders are more likely to be rearrested by .03 as opposed to those who fall in the "All Other" category at a .2031 probability. The ethnic composition variable has the weakest effect on the intercept when accounting for the probability of no rearrest. However, weak as the variable may be, we can predict that being Pacific Islander will increase the chances of being rearrested (net of the effect of risk and gender).

The probabilities listed below take the dependant variable, frequency of rearrest episode, and place the values into one of two categories called responses.

Table 16 Analysis of The Individual Parameters Based on Risk Category, Gender and Ethnicity by Rearrest Episode

Effect	Estimate	Probability
Intercept	.93	.0001
Risk Category	-.20	.0001
Gender	-.13	.0001
Ethnic Compo.	-.03	.2031

Response 1 represents "no rearrest" while response 2 represents "at least 1 rearrest." Table 17 shows the probability of no rearrest versus the observed frequency of no rearrest.

The predicted values from each profile determined how well the analysis of the individual parameters predicted our samples. In profile 1, the observed value, .90, of low risk females who are Non-Pacific Islanders comes close to the predicted value of .93, leaving a residual of -.03. Therefore, at the intercept where the sample is low risk, All Other, females, the prediction of not being rearrested is almost perfect with a slight over-prediction of .03. In profile 8, the observed value, .57, for high risk males who are Pacific Islander comes close to the predicted value of .58. Therefore, we could say that the probability of a high risk, Pacific Islanders, male not being rearrested is predicted at .58 leaving a residual of -.01.

However, in profile 6 the observed value, .84, for high risk females who are Pacific Islanders does not correspond to the predicted value of .71. Therefore we could say that the likelihood that high risk females who are Pacific Islanders not being rearrested is under-predicted by .13. This is where the model does not predict very well. The residual of .13 under estimated the likelihood that females who are high risk and Pacific Islanders would remain rearrest-free. This is inconsistent with the rest of the observed and predicted values for the other 7 samples in the model.

The variables RISK category and GENDER confirm expectations that being male and scoring a moderate or maximum risk affects the likelihood of rearrest while on probation supervision. Aside from risk category, GENDER emerges as a significant independent indicator to predict the likelihood of

rearrest by .13. Based on risk and gender these two variables predict independent of one another, the likelihood of rearrest by .20 and .13 respectively from the intercept of .93 at a .0001 probability. If we take a look at Table 17, those in profile 6 who are high risk, Pac. Isle., female have a significantly large residual.

The expectation that males traditionally recidivate more than females does not hold true in this instance. Profile 6 indicates an under-prediction of high risk females who are Pacific Islanders. Closer supervision of high risk women who are Pacific Islanders is needed to balance out the effects of the model. The data does not support the preconceived notions of female criminality for women who are high risk and Pacific Islander.

The net effect of risk in relation to the frequency of rearrest episodes does indicate that the Wisconsin Model over-predicts the likelihood of rearrest.

The structure of the data indicates risk and gender are good indicators that predict recidivism. However, when ethnicity is added, there is no significant improvement in prediction.

Table 17 Observed and Predicted Response Probabilities of Rearrest Episode of The Population Sub-Samples Based on Risk Category, Gender and Ethnicity

Population Profile	Observed	Predicted	Residual
Low Risk, Female, All Others N=87	.90	.93	-.03
Low Risk, Female, Pac. Isle. N=70	.90	.90	.00
Low Risk, Male, All Others N=372	.83	.81	.02
Low Risk, Male, Pac. Isle. N=169	.75	.78	-.03
High Risk, Female, All Others N=37	.73	.74	-.01
High Risk, Female, Pac. Isle. N=38	.84	.71	.13
High Risk, Male, All Others N=153	.57	.61	-.04
High Risk, Male, Pac. Isle. N=183	.57	.58	-.01

Three possible reasons why ethnicity did not enter in as a significant variable: first at the police stage, the booking officer may score ethnicity as to what is observed. To avoid legal challenges, the probation officer may overlook ethnicity to maintain fairness and impartiality when establishing a treatment and/supervision program.

Two, there is an unequal number of clients sentenced to probation across ethnic lines. The percentage of those within the 4 categories of ethnicity showed more Pacific Islanders are sentenced to probation than any other ethnic group.

Three, the probation population is a highly selective population. The majority of those sentenced to probation are usually minimum risk. Ethnicity may be related to recidivism in the parole population.

The study tables feature minimum risk clients as remaining rearrest free within the 2 year fiscal period. There are differences across sex and probation officer unit but after taking these differences into account, ethnicity is not a good predictor of rearrests.

CONCLUSION

This report has presented data from a study of 1130 probationers on probation in 1985/86 and followed on probation through June 1988. Risk, measured by an eleven item scale, predicted rearrest, even after case workload was presumably allocated to give higher risk probationers more supervision time. Risk was correlated with gender and ethnicity. The data shows risk is lower for women than for men and risk is higher for Pacific Islanders than for all other ethnic groups. Risk predicted rearrest net of the effects of gender and ethnicity.

There are two practical implications. Gender continues to show a relationship to recidivism after controlling for risk, but much diminished. Ethnicity differences virtually disappear when measured risk is controlled. This is important. It implies that risk is a predictor and that ethnicity can be ignored if risk is taken into account.

The continued correlation of risk with recidivism after efforts to allocate greater surveillance to higher risk offenders (whether measured across caseloads or within each caseload) suggests that Adult Probation should continue to review its case management criteria for number of contacts per month or should check to see if the nature of contacts or the place in which they occur are appropriate.

The Wisconsin model implies that differential supervision would compensate for high risk. Since the risk scores continue to predict rearrest, it seems that this is not being achieved. Caseload and workload may have to be reviewed. Probation supervisors might review if maximum and moderate risk probationers are in fact receiving all the supervision and contact the formula calls for.

NOTES

1. The authors acknowledge with great appreciation the cooperation of Nathan Kim, then the Administrator, Adult Probation Division, 1st Circuit, State of Hawaii. Conclusions in this paper are our own and do not necessarily represent the views of the Adult Probation Division.

2. There is a great deal of ideological and largely rhetorical writing on probation. Harris and McAnnay's chapters in McAnnay, Homson and Fogel (1984) are good reviews of contemporary policy issues, Petersillia (1985) and Petersillia and Turner (1986) provide summaries of evaluation of probation effectiveness and Guynes (1988) discusses operational problems resulting from a decade of rapid expansion.

3. Asian includes Chinese, Japanese, Koreans, and Indo-Chinese. The "other" category include persons of Portuguese ancestry or persons of mixed ancestry.

4. A "tracking number" is a number attached to the police "rap" sheet on the report.

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2 Critical Mass: Observations on Prison Overcrowding in Hawaii

DAVID HEAUKULANI

Editor's note. Dr. Heaukulani served as a member of the Governor's Corrections Task Force and undertook this research in 1987 for this committee. He expected to include it in the final report by the Task Force. When the committee chair announced that no report will be issued by the committee, he delivered his findings to the 1989 conference of the Hawaii Sociological Association.

THE PROBLEM

A class action filed in the U.S. District Court of Hawaii on September 14, 1984 alleged, among other things, that "severe overcrowding at both the Oahu Community Correctional Center and the Hawaii Women's Correctional Facility not only exacerbates but, in fact, is frequently the root cause for the many deficient conditions at the prison" (*Spear v. Ariyoshi*, 1984). The National Prison project of the ACLU was leading the challenge. Within the same month, former Governor George Ariyoshi appointed a Corrections Task Force to address the overcrowding issue.

The task at hand was formidable. National prison data listed Hawaii as having the highest inmate density out of 50 states and the District of Columbia as of June 30, 1984 (Bureau of Justice Statistics, 1986). Hawaii had a density rating of 31.3 square feet per inmate which was well below the American Correctional Association's minimum standard of 60 square feet of bed space per inmate.[1] In another national report, Hawaii was listed as having the highest capacity percentage at 182 percent in comparison to the other 50 states and the District of Columbia (Greenfeld, 1986). To compound the issue, the state practiced triple bunking, i.e., two inmates on a double bunk and one on the floor in a cell space designed for one inmate. Some prison administrators refer to this as maximum capacity adjustment.[2] Despite the adjustments, Hawaii's prison population definitely outgrew its rated bed capacity by 1978 as depicted in Table 1.

The situation became acute enough by 1984 to justify a federal court action. Faced with an increasing inmate population and the trend of federal court decisions in other states, Hawaii opted to enter into a consent decree by October 1, 1985 rather than risk a probable adverse court ruling. The consent decree required the state to meet certain conditions within a reasonable time.

The conditions were directed towards improvement in the facilities and services. The plans and programs to meet those conditions were to be monitored by several panels of experts. Throughout the succeeding years, the state has been unable to satisfy the experts in many cases and the issue remains problematical. The current remedy that has surfaced as of May, 1989 is to appoint a corrections master.

A corrections master is not a panacea. The appointment of a master indicates that the inmate population problem is beyond the control of local resources. For the purposes of this paper, the problem of prison population control is the subject of discussion. Popular assumptions to explain the overcrowding problem will be examined to determine the direction for further research.

Table 1 Rated Bed Capacity and Mean Daily Headcount, by Fiscal Year

Fiscal Year	Rated Bed Capacity	Mean Daily Headcount	Net Rated Bed Space
1973-74	420	297	+123
1974-75	420	310	+110
1975-76	675	541	+134
1976-77	675	539	+136
1977-78	713	611	+102
1978-79	609	659	-50
1979-80	726	730	-4
1980-81	778	851	-73
1981-82	874	1,066	-192
1982-83	940	1,366	-426
1983-84	940	1,579	-639
1984-85	1,071	1,818	-747
1985-86	1,170	1,921	-751

Source: Martha Torney, Program Planning Report, DSSH Corrections Division (Jan. 1985).

ASSUMPTIONS ON PRISON OVERCROWDING

The assumptions selected for observation in this paper do not represent the total possible range of explanations for the prison situation. These are merely slices from a whole realm of factors. The factors under consideration were selected, in part, by a subcommittee on the State Corrections Task Force. These include the incidence of crime, police activity, prosecutorial activity, demographics in terms of age, sex, and race, economics in terms of unemployment, sentencing patterns, and the planning process by the corrections

field. The observations here merely represent a preliminary examination that was conducted to determine the direction of further research into the problem.

Relative to the crime rate, some observers consider the level of crime to covary with the level of incarceration. Austin and Krisberg (1985) report that:

> Historically, an inverse relationship between crime rates and imprisonment or other criminal sanction has been consistently reported. Thus, as crime rates increased, we witness decreases in the rates of persons put under correctional supervision. Similarly, correctional caseloads seem to grow when crime rates were declining. This relationship continues to the present.

Similarly, local police and prosecutors believe that the incapacitation of offenders will tend to decrease the crime problem.[3] From the standpoint of prison crowding, it is suggested that increased police and prosecutorial activities will result in a spillover effect on the corrections system. For example, the campaign against drunk driving has increased the DUI court workload and the corollary jail sentences have taxed the weekend jail spaces.[4] Other collateral issues involve policy issues such as Act 104, Session Laws of Hawaii 1979 which funded prosecutorial efforts to target career criminals.

The demographic relationship to prison population reflects a pattern of age, sex and race. According to national data, the prison population tends to be between the ages of 20 and 29, male, and Black (Langan, 1985; Bureau of Justice Statistics Bulletin 1984; Beck and Hester, 1986). In Hawaii, the population at risk appears to be between the ages of 20 and 29, male and Polynesian (State Intake Service Centers, 1985).[5] The assumption relative to demographics suggests a positive correlation between an increase in the at-risk group in the general population and the increase in incarcerations.

The economic relationship is an assumption that criminal activity increases as unemployment rises. McGahey of New York University (1986)[6] voices a common observation regarding this relationship:

> Many people who are arrested for common street crimes are poor and unemployed, as are most prison inmates. Offenders and prisoners are much more likely to be poor and unemployed than the general population....It may seem logical to conclude that unemployment and poverty are major causes of crime and that crime could be reduced substantially by employment programs.

Sentencing is another assumption to explain prison overcrowding. The relationship to sentencing and prison overcrowding can be observed in several ways. Mandatory sentencing is the automatic way to fill up correctional facilities. A convicted class "A" felon will receive a mandatory 20-year sentence without discussion. Of course, the legislature must share the responsibility for crowded conditions if mandatory sentences are driving up incarcerations as the legislature amended the penal code each year from 1976 to 1982 with respect to sentencing.[7]

Another way that the sentencing variable is observed is the assumption that the judge's discretion has a lot to do with who goes in and who stays out. Indeed, in one survey of 29 jurisdictions, Hawaii had the third highest median sentence at 117 months for the crime of robbery (Minor-Harper and Greenfeld, 1985). And yet, only 6 jurisdictions in that survey had a lower violent crime rate than Hawaii. Moreover, at the height of its population crisis, Hawaii had the highest overall length of stay (time served in prison) in the nation at 48 months (Adams, 1987).

The final assumption is directed at the planning efforts of the corrections division. Given the observed linear crime trends, normal population growth, possible changes in the economy, observed emphasis by police, prosecutors, legislators, and possibly judges, why is there a shortfall in terms of facilities? The Corrections Director argues that the Corrections Department is not responsible for sending people to prison (Falk, 1988). This is a valid statement. However, the administrators responsible for correctional facilities must respond to the question in terms of their planning efforts.

Given these assumptions, the discussion must turn towards the examination of available data to verify or refute these popular explanations for the crowding situation. It should be noted that these explanations are not exclusive to the problem. Nor is it suggested that this examination will give absolute answers. This is merely an attempt to examine selected variables that may have some association with the problem of overcrowding.

METHODOLOGY

To examine the relationship between crime and incarceration, selected offenses over a 13-year period were correlated with the annual mean inmate population. The selected offenses were murder, rape, robbery, burglary and theft for the state of Hawaii. The 13-year period included the years from 1973 through 1985. The data set of offenses were selected arbitrarily. The 13-year period represents the time period before, during, and after the overcrowding crisis.

The time period and the annual mean inmate data were divided into 3 subsets each. The annual mean inmate data subsets were given a 1-year lag difference. Accordingly, the first subsets consist of a 12-year selected offenses group for 1973-1984 and an annual mean inmate population group for 1974-1985. The 8-year subsets comprise the 1973-1980 offense group to be compared to the 1974-1981 inmate group. Finally, the 6-year subsets contain the 1979-1984 offense group and the 1980-1985 inmate group.

The data were divided into subsets of different time periods to demonstrate that different correlations can be obtained for different time frames. This is intended to present the several perspectives or results that can be obtained if crime trends are utilized to explain incarceration trends.

Another crime data set of the traditional crime index total, violent index, property index, and drug-related offenses from 1976 through 1986 was likewise compared with the annual mean inmate data. The 10-year period from 1976 to 1985 of these offenses was compared with the 10-year period of 1977 to 1986 of the inmate group with a 1-year lag difference.

Examination of the police activity focused on two limited areas: actual offenses reported to the police and the number of adults arrested and charged. The data were compiled for the 1973 through 1985 calendar-year periods. The data compilation was limited to information obtained for the Honolulu Police activity. The Honolulu Police activity represents approximately 80 percent of the total state crime data. A simple correlation analysis was conducted between the police data and the annual inmate population data.

An examination of the prosecutorial activity was limited to the first judicial circuit (Honolulu county) which accounts for approximately 80 percent of the crime activity. This circuit was selected arbitrarily because the Honolulu prosecutor articulated a campaign of vigorous prosecution, no plea bargains, and priority to incarcerating all convicted offenders.

The record of grand jury true bills via the Honolulu prosecutor was tabulated for fiscal years 1978 through 1984. This time frame coincides with the prosecutor's first term in office and with the start of prison overcrowding. The grand jury process is a fair indicator of the prosecutor's initiative. The grand jury data were correlated with the annual mean inmate population data, as well as the crime index, and first degree arrests and charges for robbery, burglary, and drugs. These last three offenses were selected arbitrarily as they represent the barometer that the crime analysis unit of the Honolulu Police Department applies to the community's crime problem in terms of violent crime, property crime, and vice activity.

The demographic variables were examined in terms of age and race. The age for felons at time of commitment to prison was tabulated for the years 1976 through 1984. This was compared to the census of males in the age cohort of 20-29. The distribution of incarcerated persons by race was compared to the general population by race categories as reported in the 1980 census.

Examination of sentencing patterns were limited to official court data for the fiscal years 1980/81 through 1985/86. This period represents the overcrowding time frame. The four judicial circuits of Hawaii were compared with each other to determine if dispositions were similar. If mandatory sentencing removes discretion from judges, we would observe similar dispositions if all things are equal. Should there be significant differences in dispositions between circuits, it would indicate discretionary decisions are more of a determinant than legislated mandatory sentences. The annual statistical supplements published by the Hawaii State Judiciary were used as the primary source. The court caseload for Part I crimes being processed by the judiciary was selected for analysis. The key variables to be compared are incarcerations and probations.

To assess the planning responsibility of the corrections administrators, planning documents and/or budget documents will be reviewed. The purpose is to determine if the corrections field anticipated the increased level of the inmate population.

FINDINGS

Table 2 illustrates the distribution of selected offenses and the annual mean daily inmate population for a 13-year period. As noted in Table 1, the inmate headcount began to exceed rated bed capacity in the 1978-1979 fiscal year. The inmate population continued to rise accordingly in contrast to the frequency of the selected offenses. The reported crime frequency reached its peak in 1980 and started a reverse trend thereafter.

The distribution was examined in terms of three different time periods. The purpose was to display the different correlations that can be obtained from three different perspectives. That is, from a 12-year, an 8-year, and a 6-year span respectively. Table 3 illustrates the differences. Thus, if we were to observe the crime distribution for the 6 years after the overcrowding began in 1978-1979, we would get a correlation that supports the Austin and Krisberg observation. On the other hand, if we examine the 8-year or 12-year span that includes the years before and after the overcrowding, we would obtain a positive correlation.

Table 2 Selected Offenses and Annual Mean Inmate Population, by Year

Year	Selected Offenses[a]	Annual Mean Inmate Population[b]
1973	37,235	297
1974	46,022	310
1975	47,066	541
1976	50,646	539
1977	53,598	611
1978	58,243	659
1979	59,106	730
1980	65,565	851
1981	59,265	1,066
1982	60,658	1,366
1983	54,244	1,579
1984	52,431	1,818
1985	50,922	1,921

[a] State total for murder, rape, robbery, burglary, and theft.

[b] Annual mean is for fiscal years.

Sources: *Crime in Hawaii*, (Honolulu: Hawaii Criminal Justice Data Center), Annual Reports 1973-1975; *Crime in the United States*, FBI Annual Reports, 1973-1985; *Corrections Division Operations: Summary Data for Fiscal Year 73/74-84/85*, undated report; and Martha Torney, *Program Planning Report*, (January, 1985).

Table 3 Pearson Coefficients for Annual Mean Population and Selected Offenses, by 12-Years, 8-Years, and 6-Years Subsets

	Annual Mean Inmate Population By Years Subsets		
Selected Offenses By Years Subsets	12-years 1974-1985	8-years 1974-1981	6-years 1980-1985
12-years 1973-1984	.50		
8-years 1973-1980		.98	
6-years 1979-1984			-.74

An examination of the traditional crime index plus drug-related crimes compared with the annual mean inmate population will give us yet another set of correlation figures. Table 4 depicts the crime data. In this data distribution

we observe that the total index, the violent index, and property index peaked in 1980. The drug-related offenses peaked in 1981.

Table 4 Total, Violent, and Property Crime Index and Drug-Related Offenses, by Year

Year	Total	Violent	Property	Drug-Related
1976	56,039	2,031	54,008	2,956
1977	58,549	2,009	56,540	4,059
1978	63,934	2,419	61,515	4,391
1979	66,245	2,647	63,598	4,663
1980	72,102	2,887	69,215	4,992
1981	64,060	2,424	61,636	7,011
1982	65,448	2,542	62,906	5,486
1983	59,432	2,579	56,853	6,999
1984	56,913	2,408	54,505	6,420
1985	54,814	2,313	52,501	6,389
1986	60,230	2,604	57,626	n/a

Sources: Annual published reports of Hawaii, Honolulu, Kauai, and Maui county police departments, 1976 through 1986.

A correlation analysis on the data in Table 4 produces different results as illustrated in Table 5. With a 10-year base period we observe a moderate inverse correlation among the total crime index, the property crime index, and the annual mean inmate population. These inverse correlations compare favorably with the Austin and Krisberg observation. Conversely, there is a slight positive correlation for the violent crime index and a high positive correlation for the drug-related offenses.

Therein lies a contradiction of sorts. One explanation for the Austin and Krisberg observation is that crime tends to decrease because a greater number of offenders responsible for criminal activity are incapacitated. The high correlation between drug-related offenses and inmate population tend to offset this argument. We do know that Class "A" drug offenses carry a mandatory prison sentence and that this offender group receives special attention by the police and prosecutors in Hawaii.

In any event, the relationship between crime and inmate population increases is not as clear as Austin and Krisberg purport. The Hawaii data give partial support to the observation, but it also points out some contradictions for

specific crimes. It should be noted that correlations are merely statistical treatments of the data and do not indicate causal relationships.

Table 5 Pearson Coefficients for Annual Mean Population and Total, Violent, and Property Crime Indexes and Drug-Related Offenses, by 10-Year Subsets

Index Crimes and Drug-Related Offenses 1976-1985	Annual Mean Inmate Population: 1977-1986
Total Crime Index 1976-1985	-.38
Violent Crime Index 1976-1985	.18
Property Crime Index 1976-1985	-.41
Drug-Related Offenses 1976-1985	.81

The police activity for reported offenses and adults arrested and charged is presented in Table 6. Similar to the crime index and selected offenses reported above, the actual offenses reported to the police reached its highest point in 1980 and tapers off thereafter. However, the activity relative to adults arrested and charged depicts a steady increase overall. Where the 13-year period indicates a 4.3 percent increase overall for actual offenses, the adults arrested and charged had a 7.8 percent increase. In comparison, the annual mean inmate population experienced an 18.1 percent increase for the same period. There is a moderate correlation ($r=.55$) between actual offenses and inmate population. Similarly, there is a high correlation ($r=.95$) between adults arrested and charged and the inmate population increase.

If we examine the arrest data for drug-related offenses that were tabulated in Table 4, we observe a high correlation of .87 with the inmate population. Likewise, there is a .67 correlation with violent crime arrests and a .73 correlation with property crime arrests. Therefore, it would appear to be an expected observation that inmate population would increase as the police activity increases.

Indeed, the overflow of weekend prisoners has been attributed to the increase in weekend sentences for DUI (driving under the influence of alcohol) which is directly related to the active DUI selective enforcement by the police over the past five years. Accordingly, the police activity should be taken into account in determining any impact on the corrections end of the criminal justice system.

Table 6 Actual Offenses and Adults Arrested and Charged, 1973 through 1985

Year	Actual Offenses	Adults Arrested And Charged
1973	70,303	10,612
1974	85,940	14,411
1975	86,561	14,091
1976	94,489	14,982
1977	103,147	15,771
1978	118,021	15,996
1979	123,446	16,681
1980	130,958	17,301
1981	121,864	19,310
1982	122,000	19,111
1983	112,877	20,906
1984	114,607	21,206
1985	112,834	25,054

Source: Honolulu Police Department, Annual Statistical Reports, 1973-1985.

Table 7 contains the distributions of grand jury true bills for the First Circuit of Hawaii for fiscal years 1978 through 1984. It is interesting to note that the true bills during the first term of the newly elected prosecutor did not approach the high point of 1,641 true bills registered by the previous appointed prosecutor. Moreover, the low point of 1,121 occurs at the end of this first term. There is a slight inverse correlation between the true bills distribution and the annual mean inmate population (r=-.26). There are also inverse relationships between the true bills returned by the grand jury and the crime index (r=-.09), burglary (r=-.56) and robbery (r=-.71). Conversely, there is a slight positive correlation of .14 between true bills returned and the arrests and charges for dangerous drugs.

Similar to the police experience, it would be expected that a positive correlation would be observed between prosecutorial activity and incarceration; that is, the greater the emphasis on achieving convictions and subsequent

incarcerations, the greater the increase in the prison population. One could argue the Austin and Krisberg observation. That is, the higher the incarceration rate, the lower the crime rate. Therefore, if there is no crime problem, then there are no police and prosecutor workloads. The police data contradicts this as mentioned above. The police did increase its workload although the crime index decreased correspondingly. Again, this is not to say that this analysis gives a causal explanation. Moreover, grand jury true bills may not, as stated above, be a fair indication of prosecutorial priority efforts to fight the crime problem.

Table 7 Grand Jury True Bills Returned First Circuit of Hawaii, FY 1978-1983

Fiscal Year	True Bills
1978/79	1,641
1979/80	1,156
1980/81	1,337
1981/82	1,340
1982/83	1,477
1983/84	1,121

Source: City and County of Honolulu, Annual Reports, fiscal years 1978-1983

Table 8 Age at Time of Commitment for Felons in the Hawaii Prison System, by Year

	Age Group							
Year	<20	20-24	25-29	30-34	35-39	40-44	>44	Unk.
1976	39	123	86	39	17	7	9	29
1977	36	124	102	38	16	9	8	50
1978	47	155	110	43	20	13	12	18
1979	57	150	120	47	21	19	12	18
1980	60	220	149	75	29	21	20	52
1981	50	232	166	76	30	23	24	99
1982	50	306	198	90	43	34	37	95
1983	51	282	204	117	62	41	49	161
1984	74	383	266	139	91	48	63	112

Source: *Hawaii's Felons: A Statistical Report On Hawaii's Prison Population*, Report No. 85-001, State Intake Service Centers (August, 1985), p. A-6.

The demographic variable in terms of age at the time of commitment to the Hawaii Prison System is depicted in Table 8. The data illustrate the fact that the age cohorts of 20-24 and 25-29 represent the plurality at 33 and 23 percents

respectively. Collectively, the combined age cohort of 20-29 represents the majority at 56 percent. This compares favorably with the national data on inmate demographics.

Table 9 denotes the census distribution of males for the ages 20-29 from 1976 through 1984 which corresponds with the time period of Table 6 above. A high correlation (r=.91) is obtained when the 20-29 age group of felons is compared with the census of the same age group for the 1976-1984 time period. This would indicate that the population growth of the at-risk group of young males moved in the same direction as the commitment of felons in the 20-29 age group. This does not necessarily mean that the incarceration of the at-risk population kept pace with the general population of the 20-29 group. For one thing, the mean annual percent increase in the commitments of the 20-29 group is 14.12 as compared to 1.21 percent for the census data. The age variable alone cannot explain the incarceration excess.

Table 9 Census of Males, Ages 20-29 in the State of Hawaii, 1976-1984

Year	Census of Males Ages 20-29
1976	100,897
1977	102,003
1978	104,469
1979	106,596
1980	107,934
1981	109,342
1982	110,212
1983	111,314
1984	112,427

Sources: *1986 Data Book*, and *Statistical Report #179* on annual averages, Department of Planning and Economic Development, State of Hawaii.

With regard to the race variable, Table 10 indicates that the Blacks are just 2 percentage points over its comparative general population figures. This does not match the national data regarding Blacks as an at-risk racial group. It appears that the Hawaiians/part-Hawaiians and Samoans are much more over represented in comparison to their general population distributions. It has been common knowledge in corrections circles that the Polynesian group comprises the plurality of incarcerated felons, especially the Hawaiian/part-Hawaiian category. However, race should not be considered as an independent variable. The author found socio-economic status to be a determinant for the relationship between crime and the Polynesian group (Heaukulani, 1987). This would

compare with the same observations on Blacks and incarceration in other areas of the United States.

It should be noted that the Hawaiian/part-Hawaiian population figure is probably considerably higher than the figure of 80,172 reported in the 1980 census. The census definition took the race of the mother if a person had parents who were not of the same race. The estimates used by the Office of Hawaiian Affairs is about 117,000. Nonetheless, the Hawaiian/part-Hawaiian group in the State of Hawaii tends to be associated statistically with the negative aspects of social life such as crime, imprisonment, poor health, and educational and economic disadvantages.

Table 10 Hawaii Felon Population By Race: 1976-1984

Race Catetory	Mean Felon Population	1980 Census
Caucasian	105 (16)	252,455 (33)
Chinese	9 (1)	52,814 (7)
Filipino	56 (8)	97,565 (12)
Hawaiian	297 (45)	80,172 (10)
Japanese	38 (6)	189,828 (25)
Korean	4 (1)	16,880 (2)
Black	26 (4)	16,843 (2)
Portuguese	36 (5)	n/a
Puerto Rican	24 (4)	n/a
Samoan	44 (7)	13,811 (1)
Other	24 (4)	42,197 (6)
Unknown	6 (1)	n/a

Percent figure in parentheses. Percent is rounded off and may not sum to 100.

Sources: *Hawaii's Felons: A Statistical Report On Hawaii's Prison Population*, Report No. 85-001, State Intake Service Centers (August, 1985), p. A-7; and *1980 Census Of Population and Housing: Honolulu, Hawaii*, (Washington, D.C.: U.S. Government Printing Office, 1983), Table P-7.

The economic factor and its relationship to prison overcrowding was examined in terms of the unemployment factor. Table 11 shows the number of unemployed persons and the rate of unemployment for the Hawaii civilian labor force for the 13-year period from 1973 to 1985. The mean annual percent change for the unemployment frequency is -0.8 as compared to an 18.1 percent mean annual change for the inmate population. When we compare the rates of unemployment and inmate population with the civilian labor force we can observe a statistically significant inverse correlation (r=-.61). This finding will tend to reject the assumption that increasing unemployment drives up the crime

rates which will result in a greater probability of arrests, convictions and incarcerations. In the Hawaii case, the unemployment has dropped to unprecedented low levels and the economy is healthy. It does not follow that incarceration should reach excessive levels as a result of low unemployment rates.

Table 11 Employment Data Of Hawaii: 1973-1985

Year	Civilian Labor Force	Number Unemployment	Rate of Unemployment
1973	364,600	26,250	7.2
1974	375,000	29,650	7.9
1975	382,950	31,850	8.3
1976	410,000	40,000	9.8
1977	418,000	31,000	7.3
1978	420,000	32,000	7.7
1979	422,000	26,000	6.3
1980	440,000	21,000	4.9
1981	451,000	24,000	5.4
1982	461,000	31,000	6.7
1983	472,000	30,000	6.5
1984	472,000	27,000	5.6
1985	481,000	27,000	5.6

Sources: *1986 Data Book*, "Employment Status of the Labor Force," Table 353; and *1985 Data Book*, Table 329.

Table 12 is a distribution of the court data for the four judicial circuits of Hawaii. It is observed that there are distinct differences in dispositions. In the Second Circuit (Maui county), the use of probation exceeds the level of the Part I caseload and incarcerations. In the Third Circuit (Hawaii Island), the use of incarcerations exceeded probation since 1981. The results were readily observed when the Corrections Task Force visited the Third Circuit's Community Correctional Center in 1984. The headcount was over the rated capacity and inmates used temporary sleeping areas in the recreation room. When the Second Circuit was visited by this writer in 1985, the headcount did not reach the rated maximum capacity and vacant sleeping areas were noted.

A salient point to note is that the Second Circuit had a higher Part I caseload at 835 as compared to the Third Circuit at 731. More importantly, when this writer asked Second Circuit court Judge Mossman in 1986 why the Maui county had a low incarceration rate, he replied that he does not send people to prison unless he absolutely has to. This is important because it indicates that sentencing discretion may be a prime determinant as to how many

are incarcerated as opposed to the use of alternatives. The noted differences also tend to dispel mandatory sentencing as a prime cause. In fact, a Crime Commission study in 1984 could not find conclusive evidence that the increasing rate of imprisonment is attributed to the mandatory sentencing of Class A felons (Hawaii Crime Commission, 1984).

Table 12 Part I Caseload, Probation, and Incarceration For Hawaii Judicial Circuits: FY 1980-1985

Fiscal Year	Circuit	Part I Cases	Probation	Incarceration
1980	1st	533	409	209
	2nd	92	110	25
	3rd	119	59	43
	5th	24	44	19
1981	1st	653	336	229
	2nd	108	191	29
	3rd	109	42	57
	5th	56	67	15
1982	1st	495	410	236
	2nd	116	210	45
	3rd	80	31	82
	5th	46	45	18
1983	1st	1485	899	577
	2nd	166	242	47
	3rd	202	60	158
	5th	68	45	9
1984	1st	929	817	467
	2nd	219	288	51
	3rd	116	27	152
	5th	52	45	39
1985	1st	1263	699	363
	2nd	134	267	48
	3rd	105	19	155
	5th	18	25	35

Note: There is no 4th Judicial Circuit in Hawaii.
Sources: *The Judiciary State of Hawaii: Annual Report Statistical Supplement*, fiscal years 1980 through 1985.

Finally, the planning responsibility of the corrections field was reviewed through existing documents. One document is sufficient to indicate that the

planners in the Corrections Department had made accurate estimates of future inmate populations. The plan reported a projected inmate population of 1,970 adults for the 1985/86 fiscal year (Department of Social Services and Housing, 1982). As noted in Table 1 above, the actual mean annual headcount for fiscal year 1985/86 was reported at 1,921. The projections were uncannily accurate. However, the funding support to maintain those projections was not forthcoming. Even the funding for the new medium security facility was cut in half. If the new facility was constructed according to the rated capacity of the initial plan, the current crowding problem would probably not exist.

CONCLUSION

The observations of this paper represent an attempt to examine some of the popular assumptions attributed to prison overcrowding as it relates to the Hawaii problem. The selections were made by a subcommittee of the Corrections Task Force appointed by the Governor. These assumptions included crime, police and prosecutor activity, demographics in terms of age, sex and race, economics relative to unemployment, sentencing patterns, and planning by corrections administrators.

Statistically significant correlations can be obtained between the crime distribution and the annual mean inmate population. Depending upon the years selected for the crime figures, positive or negative correlations can be observed. There is support for the Austin and Krisberg hypothesis that crime decreases as inmate population increases if the correlation is made for the six-year period after fiscal year 1978/79 when the overcrowding began. It is not supported if the correlation is observed for an 8-year or 12-year period that includes the years prior to, and after, the overcrowding.

The observation between police activity and inmate population indicates a positive correlation. Although the incidence of crime decreased after 1980, the police activity continued to increase. A high positive correlation between adults arrested and charged and the inmate population was observed for the First Judicial Circuit which represents approximately 80 percent of the crime activity.

The activity of the Honolulu Prosecutor's Office was examined because the assumption was made that the "get tough" policy of that Office may have had an impact on the inmate population. The return of true bills from the grand jury during the new prosecutor's first term of office did not, in any particular year, reach the highest level of the previous prosecutor's last term in office. There was a low inverse correlation between true bills returned and the increase in the inmate population.

The examination of demographic data tends to represent the same trend that is observed in the United States. The at-risk population of males, ages 20-29, represent the majority of incarcerated felons. If race is used as a variable, the Hawaii observation indicates that Hawaiians/part-Hawaiians and Samoans are at-risk as compared to Blacks in other areas of the United States. Race should not be considered as an independent variable because socioeconomic status has been shown to be the significant determinant that is correlated with crime and the Polynesian group.

The unemployment assumption does not appear to be related to the inmate population increase. As unemployment decreased in the state overall, the inmate population increased. This inverse correlation goes against the trend of thought because the popular explanation states that poverty breeds crime and the increase in crime will be reflected in increased incarcerations.

Sentencing patterns indicate that judicial discretion can have an adverse effect on the number of persons incarcerated. In a comparison between the Second and Third Circuits, the Second Circuit had a higher level of probation dispositions over incarcerations. Conversely, the Third Circuit had a higher level of incarceration dispositions over probation. Moreover, the Second Circuit had a higher caseload of Part I offenses. If all things are equal under the law, sentencing patterns should be consistent in all Circuits.

Finally, the planning process of the Corrections Division for the Department of Social Services and Housing cannot be faulted for not anticipating the inmate population crunch. Accurate estimates were made for the decade of 1980.

This is not to say that fault or responsibility should be singled out. The problem is complex and the responsibility to resolve it can be shared by all. There are multiple reasons for the overcrowding problem (See The Edna McConnell Clark Foundation, 1982). This paper represents a cursory analysis of some of the popular reasons that are espoused. Further research into differences in the sentencing patterns between Judicial Circuits is recommended.

NOTES

1. The ACA standard of 60 square feet per inmate bed space area is reinforced by at least one court ruling, i.e., *Pugh v. Lock*, 406 F.Supp. 318 (M.D. Ala. 1976) aff-d as modified 559 F.2D 283 (5th Cir. 1977).

2. Maximum capacity entails adjustments to the rated design bed capacity. In the case of Hawaii, the design capacity for the new Halawa Medium Security Facility that opened in 1987 was set at 496. By administrative policy, the capacity was doubled to 992 and this adjustment remains controversial to date. For a discussion on the design capacity and maximum capacity in the Hawaii system, see Ault (1983). See also, Mullen (1985).

3. Testimony before the Senate Judiciary Committee by representatives of the Honolulu Police and the Honolulu Prosecuting Attorney, *Senate Hearings on Penal Code Reform*, 1986 Hawaii Legislative Session.

4. Statement by Deputy Corrections Administrator T. Sakai, March, 1985.

5. The Polynesian racial group is comprised of Hawaiians, Part-Hawaiians, and Samoans.

6. See also Thompson, *et al.* (1982).

7. Mandatory sentencing and related laws that coincide with the critical years of overcrowding include Act 181 SLH 1976; Act 210 SLH 1978; Act 98 SLH 1979; Act 284 SLH 1980; Act 69 SLH 1981; Act 166 SLH 1981; Act 206 SLH 1982; and Act 246 SLH 1982.

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3 A Domestic Violence Shelter: A Symbolic Bureaucracy

DEANNA B. K. CHANG

INTRODUCTION

Recognizing the alarming magnitude of the spouse abuse problem nationally, emergency shelters have developed across the country. Battered women can now find temporary refuge in more than 700 shelters today in America (McLeer and Anwar, 1989). The growth of this shelter movement, however, has been met by little systematic and credible analyses of how shelters operate or impact their resident populations (Berk, Newton, & Berk, 1986; McEvoy, Brookings and Brown, 1983; Loseke and Berk, 1982).

One research theme, mentioned in the still sparse literature on shelters, is, however, the perception of shelters among helping agencies and professions. These perceptions range from seeing the shelter as "the only direct, immediate, and satisfactory solution to the problem of wife abuse" (Martin, 1976) to not seeing the shelter at all as an available community resource (Davis, 1984). A second theme in the literature regards victim eligibility and in-house processing by shelters. This processing of abuse victims highlights desirable and undesirable resident attributions as perceived and acted upon by shelter staff. Loseke and Berk (1982) noted that such interactions are often based on the assumption

> ...that only those women who have made the decision to leave their homes will contact shelters, and that once contact is made, women will "automatically" enter as shelter residents.

Ferraro (1981), on the other hand, found the organizational philosophy, beliefs, and actions of shelter staff were the "critical variables in the outcome of battered women's contacts with the shelter." Ridington (1977-78), Rodrigues (1988), and Chang (1988) specifically described how shelters with a feminist perspective encourage residents' progress toward becoming independent household heads or "self-savers," aware of their competence and capabilities for decreasing their psychological dependency and subordination to men.

A third research focus concentrates on the relationship between resident needs and available shelter services. In providing emergency services, shelters, according to Giles-Sim (1983), have an empowering effect on their residents. However, McEvoy, Brookings and Brown (1983) found such a positive impact of shelters subverted by the shelter's inattentiveness to problems of public awareness, staff burnout, and interagency communication. That abused women

may experience this lack of correspondence between their perceived needs and available shelter services was also found by Loseke and Berk (1982) who pointed out that the presumption of any relationship between victim needs and shelter services overlooks the reality that shelters may lack, because of their limited resources and the diversity of victim needs, those support services, especially those long-term, sought by prospective residents.

A fourth research focus concerns the cooptation of feminist shelters into traditional social service organizations. Now a nationwide trend, such cooptation tends to "individualize, medicalize and depoliticize" the spouse abuse problem in order to comply with policies of most funding agencies (Rodrigues, 1988).

Despite such discernible themes, the available research on shelters and particularly on their impact on spouse abuse

> ...has left policy makers with little on which to build effective (and cost-effective) interventions. (Berk, Newton, and Berk, 1986)

This article addresses such a research lacunae by describing a domestic violence shelter (hereafter called CA) in terms of its "symbolic bureaucratic" (Jacobs, 1974) nature--an organizational feature that has critical implications for the relationship between client needs and shelter services and for the future development and implementation of shelter programs. The article argues that CA's progressive institutional embedding in a large, conservative social service bureaucracy (hereafter called SSA) resulted in its transformation into what Jerry Jacobs calls a "symbolic bureaucracy"; this organizational incorporation has, moreover, impacted significantly the shelter's original goals and its internal structure and functioning.

THE SYMBOLIC BUREAUCRACY

Since the late 19th century, bureaucracy has been approached from two points of view by classical sociologists like Weber, Mosca, and Michels (Eisenstadt, 1959). According to one perspective, bureaucracy is any formal, hierarchal organization which is rationally oriented toward stated goals that define the manifest or formal purpose of the organization and that are accomplished via formal structures of the organization (Taylor and Bogdan, 1980). As such, a bureaucracy is seen as "an epitome of rationality and of efficient implementation of goals and provision of services" (Eisenstadt, 1959). An alternative and not necessarily contradictory view sees bureaucratic organizations as primarily instruments of power, controlling individuals and

continually expanding its influence over many different areas beyond its original purpose (ibid.).

Whether a goal implementer or power structure, a bureaucracy is characterized by four essential features that have been identified by Blau as: "...specialization, hierarchy of authority, system of rules and impersonality" (Jacobs, 1974). However, Jacobs argues that sometimes bureaucratic structures exhibit a symbolic nature, which arises whenever the organization deviates from those four recognized prerequisite conditions of a bureaucracy while portraying an image of its adherence to such ideals. Jacobs cites a welfare agency in which he worked as exemplary of his concept of a "symbolic bureaucracy." How CA, as a symbolic bureaucratic organization, also deviated from each of Blau's four bureaucratic ideals is described below along with how its present parent agency's bureaucratization of the shelter, through its administrative takeover, impacted the shelter's originally conceived purposes, structure and overall functioning.

METHODOLOGY

The article employs an interpretive retrospective approach in analyzing the author's observations and experiences as a shelter employee from 1980-1987. In employing this method of analysis that is analogous to an interpretive historical approach as defined by Skocpol (1984), the author specifically uses an explicitly stated conceptual framework to define the central research concern of the paper and to guide the selection and presentation of recalled events.

Given the possibility of recall bias, additional information were, however, also derived from a review of published and unpublished materials about the shelter in question and about its present and former parent agencies, like annual shelter reports, program flyers, and staff communiques, made available to the author.

Moreover, purposefully focused and partly open-ended, face-to-face interviews with the author's former co-workers, employed during that above period, were also conducted. Only eight such co-workers were locatable for interviewing. Three were also former shelter residents and three were those shelter staff carried over by the present parent agency of the shelter. Before focusing on CA's characterization as a "symbolic bureaucracy," the paper briefly presents that shelter's historical background to provide the context against which its organizational transformation and accompanying effects must be seen.

HISTORICAL BACKGROUND

CA was an offshoot of community development efforts in one of the more populated counties in the state in the 1970's. For prior to CA's creation, comprehensive and coordinated support services for family violence victims, especially abused spouses with children, were largely lacking in the state. Legal services were particularly problematic; the police had no official policy for arresting abusers and tended to view family violence as private or cultural, not criminal, matters. Vigorous intervention by even the prosecutorial and judicial systems was uncommon. Victim advocates for those wishing to prosecute their abusers were few in number as well. Even the medical and health professions were not adequately trained and staffed to recognize the "battered woman" and tended to treat such clients from a biological or mental health model of patients; thus intervention from those health systems was minimal too. The trauma of family violence for its victims was undoubtedly worsened by the lack of adequate and coordinated support services in the community.

With the resultant heightened concern in the early 1970s over family violence in the state, a large, private social service agency (hereafter called SSA) helped organize a committee to review the problem and to propose recommendations for closing the observed gap in available social services for family violence victims. In particular, there was clearly a need for a safe, transitional community-based setting to provide 24-hour emergency shelter services for such victims. By the mid 1970s, the first of such shelters, CA, was developed as a demonstration project in one outlying community. A selected delegate agency (hereafter called DVA) was placed in charge of operating CA. DVA was itself a small, grass-roots non-profit group incorporated to promote health and family reconciliation.

As CA's initial parent agency, DVA set shelter policies and procedures by establishing a planning or steering committee, comprised of representatives from social service agencies, abuse victims, medical and legal professionals and its own Board of Directors. As a result of their collective efforts, CA opened up as a 24-hour emergency shelter to only abused spouses with children for a temporary maximum stay of five working days on a first come, first serve basis. Up to three stays were permitted as a rule for each resident. A central goal of CA was to help women realize that they could make the decision to end the abuse. Consequently, in promoting self-change, CA generally did not encourage longer or more frequent stays by residents.

As a shelter with only 5 bedrooms, CA offered no direct services other than providing bed and board, clothing, and in-house or hotline counseling in a supportive, homelike atmosphere for which financial donations from residents

were welcomed, but not mandatory. Referral information to emergency domestic violence services was also provided by CA's small and dedicated staff, who comprised at first a resident manager, an assistant, two regular weekend relief staff, and occasional volunteers. Initially staff comprised both male and female workers and until 1981, achieved success rates, based on self-reports by residents leaving abusive relations, of approximately 64%. Since its opening, CA was virtually autonomous in its operations and decision-making. The professionalization and hierarchal stratification of its staff were, moreover, downplayed, facilitating thereby the ready development of primary group ties among staff and between staff and residents.

By 1981, however, CA was administratively taken over by SSA, since DVA was not a statewide social service provider and was therefore less capable of handling the increasing paperwork needed to operate CA. SSA maintains today the administrative responsibility for CA, which is presently identified as an integral component of SSA's community-based residential group homes. As CA's new parent agency, SSA has increasingly imposed its ever changing organizational norms, practices, and philosophies on CA, although initially SSA minimally interfered with the shelter's day-to-day operations and decision-making. Public identification of CA with SSA was actually downplayed until the mid-1980s when an executive order directed CA staff to identify SSA as CA's parent agency in answering crisis calls to highlight thereby SSA's forefront involvement in domestic violence intervention services in the community.

SSA continues to develop and implement CA services and policies and to provide for the ongoing funding of the shelter's program operations. Largely through intensive lobbying, grant proposal writing, and agency fund raising projects, SSA pursues that critical task. In the late 1980s, funds were also derived from mandatory in-house "donations" from even part-time relief staff and from residents (by then designated by SSA as "clients") who were assessed daily rates for their residential stays. The latter funding source was necessitated by the higher costs of maintaining SSA's expanded domestic violence shelter program, which encompassed by 1987, three houses in which residents, including now childless and single abused women as well, could stay up to two months. Earlier program changes permitted stays of two weeks, one month, and up to six months. SSA's expansion of the original shelter population and residency duration partly developed in response to not only the acquisition of new governmental funding contracts or private grants for different victim advocacy services, but also to the growth of other shelters in the community operated by other social service agencies, feminists, the military, and religious groups. SSA's competition for the limited funds for shelters from both public

and private sectors remains the most critical problem for CA apart from its on-going legitimation and staffing needs (Chang,1984).

The article now addresses the unforeseen consequence of SSA's administrative take-over of CA, notably CA's transformation as a "symbolic bureaucracy," by evaluating Blau's four bureaucratic ideals in terms of their functional and apparent adherence within CA.

SPECIALIZATION

As the first of these ideals, specialization of role or job tasks was implemented within CA after CA's structural integration into SSA's own complex bureaucratic organization as the newest of its group home programs. This organizational change reportedly aimed at facilitating the processing of personnel matters for all of SSA's group homes' employees, even though a clearly different residential population and set of victim needs were being addressed by CA. Despite this significant difference, specialized positions paralleling the division of labor in SSA's other group homes were assigned to CA's carry-over staff. These positions were assigned formal titles like "Director," "Child Development Aide," "Social Service Aide," and "Client Social Worker," which was later relabeled "Client Advocate." Detailed role descriptions for administrative use were drafted up by SSA as well for each of those differentiated staff positions, whose numbers grew as more shelter services were added, like the children's treatment component. Moreover, all of the specialized positions, except those of the Director and Client Social Worker/Advocate, became categorically known as "paraprofessional" in counterdistinction to "professional"--the latter title SSA primarily reserved for its social workers. This official status distinction created by SSA would contribute by 1987 to staff fragmentation within CA, since SSA's surveillance and control of CA's paraprofessionals became markedly greater over the observational period.

SSA's imposition of specialized staff positions, however, did not preclude CA's staff's exhibiting of extensive role or task sharing in running the shelter. This was observed particularly in instances of position vacancies and of role incompetence - commonplace events during the author's employment at CA that jeopardized when they occurred the actual 24-hour provision of residents' individualized treatment plans, transportation services, child respite care, and psychoeducational counseling as envisioned in CA's new litany of formal goals. The House Manager, Child Development Aide, and even the Client Social Worker/Advocate roles were the most nonexclusively and irregularly performed; at least five House Managers, seven Child Development Aides, and six Client Social Worker/Advocates successively came and went during that time period.

This high turnover of key shelter staff not only led to limiting organizational goals at those times, but also to working under extremely stressful conditions. As one former resident-relief staff recalls:

> When I was a client, staffing was problematic. CA services were reduced to providing clothing, food, and a place to stay. Developing close ties was difficult since she [the social worker] was so busy trying to run the shelter.

SSA's heavy reliance on the employment of "Relief Staff" for shifts lasting eight or more hours on weekdays and by 1987, up to 48 hours on weekends also meant extensive role-sharing. These were paraprofessionals who took over the shelter's operation after 4 p.m. or whenever the regular weekday staff left CA's employ or went on scheduled or emergency leaves. Such staff were to handle by themselves much of the role responsibilities of the above three positions, however without those positions' formal titles and compensations, including annual bonuses, to keep the shelter fully operational and presentable 24 hours. In labor shortage crises, even the Director engaged in role-sharing and when that position holder was not available, SSA's other administrative staff or CA's House Manager took over temporarily.

On the whole, CA's staff positions were thus functionally interchangeable rather than exclusively held and performed by particular individuals. Moreover, despite SSA's emphasis on specialization, staff professionalization was not mandatory. Only up to 8 hours of on-the-job training was given for paraprofessional staff positions before the role incumbent soloed in contrast to the minimum of 50 hours given to the State's suicide hotline workers. Much of CA's in-service training was spent familiarizing the trainee with the official processing of crisis calls and accepted residents, including the accompanying paperwork involved in screening and doing resident intakes and transportation. No lengthy formal training for counseling, child care-giving, or housekeeping was given or even expected of such staff. Even staff development opportunities were limited and far between during the observation period. So almost anyone who applied, including paraprofessionals within and outside CA, were hired. With minimal formal education and technical skills needed, CA's paraprofessional staff were nevertheless publicly identified in its organizational flyers as "[q]ualified staff in the areas of domestic violence" although coming from widely diverse occupational and educational backgrounds, like fine arts, social sciences, theology, accounting, secretarial arts, food service, home economics, the military, construction, public transportation services, cosmetology, and even domestic engineering. Direct or indirect exposure to domestic violence or even previous shelter experience was also not required of CA staff applicants.

Consequently, as far as specialization with its presumption of professionalization was concerned, it was more professed than realized; there was simply an expedient division of labor, filled by SSA's liberal hiring and cost-containing policies rather than the actual employment of professionals or experts for those administratively recognized staff positions.

HIERARCHY OF AUTHORITY

As the second bureaucratic ideal, a hierarchy of authority was also instituted with SSA's administrative takeover of CA. Instead of a democratic or relatively self-governing shelter as before, a formal hierarchy of control was envisioned for CA to increase ideally its organizational efficiency and accountability to the parent agency. This new top-down chain of command was to reflect therefore the superordination of SSA administrators over CA's entire carry-over staff; and within CA, to establish the supervisory position of the Director, who had risen up the ranks as a social worker since the DVA days of the shelter, over the rest of the shelter staff.

The relief staff, despite their functional indispensability, were noticeably subordinate in this new chain of command. Minimal input from their ranks was solicited in determining official shelter policies, particularly those affecting CA personnel, clients, and program services; for example, in changing weekend relief schedules from 24 to 48 hours, SSA gave less than one month's notice to those staff members directly affected.

Those with social work degrees were now, however, pivotal in SSA's decision-making as it related to CA. This hierarchal arrangement of CA staff now meant the more visible minority group status of the paraprofessionals, especially the relief staff, given their observable low organizational status, economic disadvantage and relative powerlessness within CA. Such a status difference was particularly highlighted when those individuals sought from SSA collective wage adjustments in line with existing labor laws. SSA administrators initially had urged those CA staff to see their work as also being "charity." The loss of pre-SSA egalitarian and informal relations and the collective experience of deprivation of justice on more than one occasion contributed to the increasing social distance observed within CA toward SSA and to the marked lowering of staff morale and cohesiveness by 1987. As one House Manager put it just before leaving CA, "It was no fun working there any more."

Though logically conceived by SSA, the chain of authority was imperfectly staffed almost from the start; social work-oriented, SSA understandably placed its MSWs as program administrators at the top of its bureaucratic hierarchy, but those individuals did not always have administrative

training and successively came and went four times during the observational period as SSA either reorganized itself for professed "New Beginnings" or as those administrators simply left SSA's employ. These recurrent administrative vacancies meant temporary accountability gaps in the established chain of command, which inhouse replacements attempted to address. Such individuals, however, tended to exhibit a limited understanding of CA's internal operations and staffing needs along with a common penchant for new policies, philosophies, and more paperwork. The latter were often simply revisions of earlier forms like those for counting clients and the services rendered by CA staff. Useful as staff surveillance and resident-service accounting techniques, all such paperwork merely added, however, to the volume of what Hengerer (Gibbons,1987) identified as time-and motion-filled, non-treatment activities, like report writing and client transporting. Such activities were seen by staff as detracting from their availability for intensive counseling and developing of close ties with their residents.

CA's Director, moreover, was observed as lacking the administrative capabilities of either a task- or socio-emotional-specialist during this same time period. Since the mid 1980s, increasing staff complaints against that individual's administrative shortcomings were aired singly or collectively to SSA superiors, but resulted in little observable improvement in the Director's role performance at CA. Negative attributions, like "burnout," "lazy," "wishywashy," and "legislative goffer" were expressed in interviews with the author. The Director may have been apt in pursuing administrative duties away from CA, especially as SSA's organizational standard bearer, but as a policy maker responsible for implementing and evaluating decisions affecting CA, the Director exhibited questionable ability and loyalty to those staff most affected by such decision-making. A specific illustration of that Director's inefficiency was the inadvertent publication for more than a year of the shelter's actual location in the State telephone directory through administrative oversight. Its discovery intensified the social distance already felt toward that individual, since security problems had been repeatedly documented earlier by CA staff throughout the observational period; unknown male prowlers and even relatives and spouses of residents have unexpectedly entered the shelter's premises on a number of occasions. One especially vivid event involving such territorial encroachments occurred around mid 1987 when the shelter was literally under siege for at least a month by a resident's distraught boyfriend. He terrorized the shelter day and night; vandalized CA property by breaking windows, stoning staffs' cars, and tramping through the bushes on that side of the shelter lacking a fence; and brazenly paraded in front of the shelter gate, sometimes brandishing a stick or going shirtless as a macho gesture. Apart from this instance of a security breech, there were five incidents on the author's own shift where abusers revealed when interrogated that they had located the shelter either through the

directory or an informant like a neighbor or even a resident. The Director's inability to get long-standing repairs of shelter doors, windows, fences and gates done quickly or to hire an additional night person did not go over well with anxious staff and residents. Moreover, the Director's authorized purchase of new office carpets, paint, and storage cabinets instead of the above needs underscored staff perceptions of the greater priority of SSA's maintenance goals of personnel cost-containment and organizational impression management over its implementation of its avowed goal of providing a 24-hour safe and secure shelter for its residents.

Consequently, although there was a hierarchy of authority imposed on CA's carry-over staff, giving CA the appearance of having a functionally operative and necessary command hierarchy, the anticipated increased organizational efficiency and accountability were less apparent.

RULES

As to the third bureaucratic ideal, every bureaucracy has its set of standardized rules or official code of conduct to exert its "ideological control" (Derber, 1984) over its personnel and program implementation and direction. SSA's bureaucratization of CA after its administrative takeover also involved the formulating of such regulatory norms to cover the shelter's provision of services to the community. Staff were therefore given an official instruction manual that was to be continuously updated in response to new contingencies and diligently followed to expedite shelter services. It specifically detailed the handling of crisis calls, resident transportation needs, intakes, house rule violations, and departures among other shelter procedures. Which forms, how many, when and how to process those forms were all spelled out also on official memos to the staff or at lengthy staff meetings, now mandatory for even part-time relief staff and more frequently scheduled over the observation period as SSA tried to address its intramural communication gaps.

Through these official pronouncements, standardization of shelter procedures with its implicit assurance of impartiality to residents was the expected outcome. However, this expectation was as well more of an organizational ideal than a reality at CA. The instructional operational manual, for example, was only sporadically updated since its initial compilation. Partly responsible for this situation was that recurrent staff turnovers necessitated the reallocation of the shelter's remaining staff to more pressing needs.

CA staff, moreover, have not always complied fully with SSA's growing body of rules that developed in part from SSA's reaction to new situational developments, like resident or sister program administrator's complaints about

certain CA staff. Those governing resident relations were frequently given varying degrees of staff compliance; one SSA prohibition was that against the staff's fraternization with residents or even former residents. Numerous incidents of this rule infraction or subversion have occurred during the observation of the program as it existed *in situ*. Apartment sharing, dating, even attending resident or former resident's celebrations, like birthdays, weddings, or open house parties, have been attended by some staff surreptiously via collusions or openly. If the latter occurred, such socializing activities were readily rationalized as resident "outreach" or "recreational" activities to inquiring supervisors.

Other staff have even bent the resident eligibility rules at times, such as when a former resident seeks re-entry, but is not in a life-threatening situation at the time. If a room is available and she has been an "ideal" (no problem) resident, she is then generally accepted as a "preventive" admission or as an instance of staff's expected compliance with SSA's own Golden Rule to treat residents as they would themselves like to be treated - an administrative mandate that was promulgated repeatedly by SSA supervisors by 1987. At other times, if the resident population was already high, staff have denied new entries even though told that prospective residents could be temporarily couched in the living room or placed in another resident's bedroom; desiring manageable caseloads on their shifts rather than simply filling up contracted bed space quotas, certain staff have, however, re-routed such crisis callers to other crisis lines or have put off those callers until the next shift came on duty. The latter staff response was commonly observed being reserved for those crisis callers desiring returns, but who had been problematic as former residents. In any event, either tactic (out-referrals or delayed admissions) was still in compliance with SSA's expectation of rendering shelter services to all crisis callers. Overall, the occurrence of such staff behaviors does create the illusion of abiding by the rules and imparting to residents the impartiality implicitly guaranteed by those rules. However, it also underscores further CA's characterization as a "symbolic bureaucracy."

IMPERSONALITY

As the last bureaucratic ideal, impersonality between ranks was also less evident within CA. In particular, favoritism characterized especially two levels of relations within CA: that between the Director and the last House Manager with whom the author worked and that between CA staff and residents. The lack of impersonality in the relationship between the Director and that House Manager manifested itself in not only the paying of comp time money to the latter, while requiring other staff, particularly the Client Social Worker/Advocate, to take time off from work or to accept a flat monetary fee

for overtime payment, but also in the Director's continual overlooking of role incompetence by that House Manager; for example, on a number of occasions, time sheets were misplaced, incorrectly processed or undelivered by deadlines; petty cash and emergency food money were forgotten or unbalanced; food and household supplies were short on other shifts; SSA memos were misfiled; daily logs and service forms were not regularly updated; and the general upkeep of the houses, especially the kitchen and laundry areas, were problematic. Nevertheless, these and other recorded examples of role incompetence were generally overlooked despite numerous complaints by not just other co-workers but also residents. The Director's formal designation of that individual as the immediate supervisor of other paraprofessionals by 1987, however, was most illustrative of this lack of impersonality on that level of shelter relationships. Further staff fragmentation and lower morale not surprisingly were observed.

Favoritism toward certain residents, however, was more tolerable. Clearly CA staff favored those residents who demonstrated friendliness, compliance with staff and house rules, and particularly a willingness to end the abuse. Such residents were more likely to be given greater staff interaction, extended residential stays, airfares, rental deposits, monetary loans, household items, food, and clothing to start new lives elsewhere. They were even hired as paraprofessionals during the observational period. However, by 1987, the last of such shelter staff was dropped by SSA just before her probation period ended for exceeding SSA's computed average number of sick days per annum expected of its employees, despite protests by her co-workers and residents at the time. Her loss as an invaluable role model for residents and SSA's nonresponsiveness to their collective protests noticeably affected further the already low staff morale.

It was different, however, for those residents who exhibited none of those desirable traits and who may additionally be known as substance abusers, inattentive parents, emotionally disturbed individuals, and especially as residents with infectious diseases like herpes or criminal lifestyles as prostitutes, shoplifters, or welfare violators. A graphic example of how a difficult resident was treated was recounted by one interviewee:

> She [the resident] came in making trouble...[and] felt the world owed her a living....She was guilty of welfare abuse...(and) started throwing stuff over the kitchen; other women accused her of being lazy, sloppy, not helpful. I had to call...[the Director] to take care of the bitch!

More typically, problematic residents were blacklisted or exited from the program as quickly as possible. Sometimes, however, such clients would

directly or indirectly appeal to the Director or even to SSA administrators. The latter, to avoid adverse publicity, generally overrode such CA staff's transactions even in light of staff protestations. The "creaming" of prospective residents was nevertheless still practiced as it is in other social service agencies (Wegner & Jackson, 1985; Jacobs, McGahey, & Minion, 1985). However, the lack of administrative support for staff decisions in those situations of rejecting problematic residents has resulted in direct and sometimes hostile confrontations with the Director and SSA administrators. The occurrence of such divisive events led one former Client Social Worker/Advocate to candidly admit when interviewed that she consequently "...found it disenchanting to be trying to empower women while the level of staff morale was low along with high turnover and minimum administrative supports."

The CA staff-resident relationship also entailed distrust rather than impersonality; staff-shared experiences recounted those crisis callers who have lied to gain entry by faking the abuse or even their names. Yet other residents have been recalled breaking house rules despite having signed contracts against such activities. Re-entry attempts by such identified residents have generally been met with reluctance by staff or by the latter's social typing of such individuals in terms of Tannenbaum's "dramatization of evil" (Siegel & Senna, 1988). But perhaps the most dramatic instance of staff distrust involved the time when a resident asked to see her file. Her request nearly precipitated an administrative crisis since there was no official procedure for handling such requests. Censorship of her file entries resulted and a sanitized version of staff observations and commentaries was finally shown her by SSA administrators. Given such examples, even the bureaucratic ideal of impersonality was not always adhered to by CA staff or their administrative superiors in their relations with each other or with residents.

CONCLUSIONS AND IMPLICATIONS FOR THE "BUSINESS" OF SHELTERING

Obviously only a few of the many discrepancies between the avowed and actual workings of CA as a "symbolic bureaucracy" have been presented above. All of which are seen as stemming from SSA's administrative takeover of CA as an extension of its residential group home programs in 1981. SSA's progressive bureaucratization of the shelter did not, however, preclude either the observed discrepancies from those four bureaucratic ideals envisioned by Blau, namely, specialized positions, a hierarchy of authority, a body of rules and impersonality, or those visible changes in the shelter's original goals or in its internal structure and functioning.

Given the validity of this organizational analysis, as primarily based on a reconstruction of a seven-year shelter worker's career, the provision of future shelter programs through traditional social service bureaucracies does not necessarily guarantee a better fit between resident needs and shelter resources. Generally recognized is that "[t]raditional social service agencies have been widely criticized for being unresponsive to the needs of battered women...[given] the imperatives of bureaucratic organization operating in contradiction to women's immediate needs...." (Loseke & Berk, 1982).

In this case, there appeared to be a lack of organizational incentives within such a complex bureaucratic setting as SSA to institute quickly needed safeguards (like improved security measures) and personnel changes (such as adequate and truly qualified staffing and staff-affirming and -supportive supervising). Both of which were clearly needed to actualize and maintain more efficiently and effectively CA's avowed goals of preventing and reducing spouse abuse through its promotion of victim advocacy and counseling on a 24-hour basis in a safe and secure residential setting. Their presence would have, moreover, helped to reduce staff burnout and alienation from the parent agency. Market forces, cost-control orientations, and staff surveillance seemed especially operative in delivering such avowed shelter services after 1981. The high resident success rates of pre-SSA days and its strong staff solidarity were noticeably lowered after the shelter's administrative takeover; by 1987, the former was estimated to be 1 out of 50 to 1 out of 200 residents by those interviewed and with the departure of the author in that same year, only the Director remained of the original carry over shelter staff.

Moreover, as those above organizational orientations became dominant in SSA's handling of shelter operations, including its personnel, the "'creaming'" of prospective residents, the meeting of contracted shelter services, especially bed counts, and the overall accumulating of statistics, rather than the active promoting by staff of residents' empowerment as "self-savers" (Chang, 1988) or actual organizational achievement of "quality" of shelter services appeared to be new official directives in regulating staff-resident relations by 1987.

Effective domestic violence shelters, however, cannot be implemented and operated with such perceived organizational priorities. Future planning and development of shelters for abused women must contain the increasing tendency toward the bureaucratization of shelter operations and relations within shelter walls, since such an organizational process appears dysfunctional over the long term for both shelter goal-attainment and overall functioning and structure. In other words, "[i]t is important that a battered woman does not simply become one more 'client' who needs to be processed through elaborate systems not set up to 'help her'" (Ahrens, 1978).

Proposed as a structural alternative to the embedding of shelter programs within large conservative social service organizations is instead the advocacy of smaller scale, grassroots-developed feminist shelters. For within those settings flourish relatively egalitarian and autonomous relations and extensive program participation by staff and residents (Rodrigues, 1988) that encourage the development of those intensive and affective ties between staff and residents which the author (1990) sees as critical to helping abused spouses end the cycle of violence in their lives. Whether such a shelter alternative is indeed a more realistic and effective institutional response to the still growing social problem of domestic violence in the state is presently being examined by the author.

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4 Patient Consent: Issues in the Legal Regulation of a Client-Professional Relationship

ELDON L. WEGNER

PATIENT CONSENT: ISSUES IN THE LEGAL REGULATION OF A CLIENT-PROFESSIONAL RELATIONSHIP

Role relationships in modern societies tend towards increasing formalization, as noted in many of the classic works in sociology. Formalization is characterized by replacing social bonds based on personal attachment and diffuse obligations with impersonal, contractual ones based upon specific rights and obligations. Role performances, furthermore, are to be accountable to certain technical standards (Durkheim, 1964; Parsons, 1939; Simmel, 1950: 317-29; Weber, 1958: 196-244). Recent changes in the legal status of patient rights within physician-patient interchanges are a further manifestation of this tendency towards formalization and rationalization in modern societies (Betz and O'Connell, 1983; Matek, 1977).

Structural changes in the medical context have left patients open to various forms of exploitation and neglect. This situation provides the background for the development of legally mandated patient consent procedures as a step towards greater formalization of the doctor-patient relation. The paper addresses the limitations of law to transform the nature of the social transactions between doctors and patients. This paper shows that implementation of legally prescribed procedures is mediated by the cognitive understandings of actors and the social conditions within which encounters take place. The paper concludes with suggestions for alternative approaches to protecting the interests of patients.

In 1983 a new law was signed in the State of Hawaii to require all physicians treating breast cancer patients to present a standardized patient education form about alternative treatments. Following its passage, the author explored the possibility of undertaking research on the effects of this law. The research proved infeasible, but informal interviews were conducted with physicians with major responsibility for treating patients with breast cancer in four of the major medical centers in Honolulu, including two surgeons, one oncologist and one nuclear radiologist. This paper is based on material from these interviews along with experiences of the author as a member of the research committee of one of the medical centers in Honolulu.

TRANSFORMATION OF DOCTOR-PATIENT RELATIONSHIPS

The analysis of patient consent must begin with an understanding of the nature of the traditional professional relationship between doctors and patients and the factors which have impacted doctor-patient encounters in the last several decades.

The Professional Model

The traditional doctor-patient relationship was characterized by Parsons as one of paternalism, where the patient assumes a role analogous to that of a dependent child (Parsons, 1951: 428-79). The concept of the sick role developed by Parsons further emphasized the passive-dependency of the patient, including the obligation to cooperate with medical treatment. Doctor-patient transactions are presumed to take place in a framework of patient confidence in the expertise of physician decision-making and trust that the physician will attend to the well-being of the patient.

The professional model, most thoroughly presented by Freidson (1970b), further elaborated the basis for patient trust in the physician. Medicine is granted the status of profession because physicians have mastered an esoteric body of knowledge which underlies their right to autonomy in medical decision-making. The profession, furthermore, is guided by a service ethic and a conception of "medical responsibility" for the well-being of the patient. The profession is also responsible for monitoring the actions of its members.

Doctors and Patients in the Medical Marketplace

Whether or not patients were ever as trusting or physicians as disinterested as these formulations suggest, the context of medical practice has undergone radical transformations in recent decades which have seriously undermined such a simplistic model. These developments have been detailed by other social scientists (e.g. Starr, 1982). Only a brief overview will be given here.

First, the bureaucratization of the medical context has reduced the quality of doctor-patient encounters. Physicians increasingly practice in groups settings; patient contacts have been shortened in order to manage large case loads; and relationships have become fragmentary and transitory as patients are referred to specialists for specific problems. Despite the technical advantages of group medicine, physicians rarely know much about their patients apart from their specific medical complaints, and patients are skeptical that physicians understand their problems or care about them (Mechanic, 1976a; 1976b).

Second, patients have become commodities in a medical-industrial complex consisting of large medical centers, staffed by teams of specialists and supplied by medical equipment and pharmaceutical interests. These entities have vested interests in promoting particular kinds of treatments. Health is assumed to be an entity which can be sold and purchased, and patients themselves have exchange value as economic commodities in the health care market (Carlson, 1975; Illich, 1976). Medical decisions are not purely neutral, technical means to assure patient well-being. They also entail benefits which accrue to members of this industrial-medical complex. Medicine is big business (McKinlay, 1977; Waitzkin, 1974).

Third, physicians are becoming "proletarianized," as they cease to own the means of their productive activity. Physicians are increasingly employed by or at least under the control of third-parties. The dangers of third-party medicine as a threat to the professional autonomy of physicians has long been recognized (Field, 1961; Mechanic, 1976a). During the past decade, the concern with cost-containment has resulted in an explosion of health maintenance organizations, preferred-provider contracts, cost-ceilings on hospitals, quotas on medical testing and prescriptions, and other forms of medical rationing. Changes in the reimbursement practices, especially institution of payment schedules based on the use of Diagnostic Related Groups, also impact on medical practice. Medical decisions are not based solely on medical science and concern for the well-being of patients, but increasingly the financial self-interests of the organizations for which physicians work or insurance programs which pay their fees (Mechanic, 1985).

The Problematic Consequences of Medical Technology

In addition to changes in the organization and political economy of medical practice, a final set of changes within the technical sphere of medical practice must also be acknowledged as critical to the emergence of patient consent procedures. These changes regard the special consequences of new developments in medical technology.

Expanding medical technology confronts physicians with more problematic decisions. The normal mode of medical decision-making is one of diagnostic classification, based on the presenting complaints and physical examination of the patient, followed by the "normal course of treatment," suggested by the prevailing medical understanding of the diagnosed condition. Medical technology, however, has complicated such decisions by increasing the available diagnostic measures and treatment modes, thus making possible alternative courses of action. Many of these measures, however, have uncertain outcomes with risks of significant negative side-effects (Thomas, 1977).

An additional problem stems from the trade-off between medical outcomes and non-medical values. For example, in some cases medical technology permits the extension of life under conditions which severely limit the quality of life. What may be an acceptable outcome in purely medical terms, may be unacceptable to the patient. While medical science may enable physicians to make purely medical judgments based on scientific criteria, medical expertise is insufficient as a basis to determine the appropriateness or desirability of treatments as they affect non-medical, quality of life outcomes for their patients (Wulff, 1981; Shingleton and Shingleton, 1980; Shain, 1980).

THE DEVELOPMENT OF PATIENT CONSENT AS A LEGAL RIGHT

The changes in the organization and practice of medicine reviewed above make it clear that it is simplistic to assume that medical decision-making is a purely technical matter, where a physician, whose interest is the well-being of the patient, undertakes a scientifically-based intervention. In addition to the fact that evidence may be ambiguous regarding the most effective treatment, the decision must take into account competing values. Physicians furthermore are subject to external pressures by third parties, and they have vested interests in undertaking particular treatments in terms of the possibilities for obtaining financial, research, career development and other goals.

While the general public may not understand the details of these developments, there is a general recognition that doctor-patient relationships have changed. Physicians are often suspected of subordinating interest in the well-being of the patient to their financial and professional goals. The explosion of malpractice suits and the emergence of a consumers movement aimed at reassuring patients their rights in medical transactions can be seen as a consequence of this distrust and the breakdown of the traditional emotional ties between doctors and patients (Mechanic, 1976b; Betz and O'Connell, 1983).

One means by which physicians are able to make decisions in their own interests, is through the control of information. Not only do patients lack medical knowledge by which to evaluate alternative modes of treatment, but they are often deliberately kept ignorant regarding their own conditions and prognosis (Davis, 1966; Waitzkin and Stoeckle, 1976; Fisher, 1984).

During the past two decades, the rights of patients to information and to participation in medical decision-making affecting their well-being has been established through a large number of court decisions as well as through new laws enacted through legislation.

These rights are most conspicuously embodied in patient consent procedures, which include informing the patient about the nature of the treatment, possible side-effects, the risk of these side-effects, and the availability of alternative treatments. Patient consent is usually implemented through a doctor-patient transaction, during which the physician obtains the signature of the patient on a patient consent document. In cases where the patient is a child or is physically or mentally incapable of making decisions, a family member or other person may represent the patient.

Litigation has continued as courts have faced the task of clarifying the meaning of what constitutes acceptable patient consent. Some courts have ruled that merely obtaining a patient's signature does not fulfill the requirement unless the patient has a "reasonable" understanding and that "significant" risks and other facts "material" to the decision-making are disclosed (Edelman and Edelman, 1977).

Legal Developments in Hawaii

In the face of the growing number of court judgments extending the legal rights of patients and the crisis created by the escalating cost of malpractice insurance, state legislatures have enacted additional laws to tighten patient consent procedures. The State of Hawaii passed a general law in 1976 requiring the Board of Medical Examiners to establish reasonable standards of disclosure of information to patients and to require the written consent of patients for medical procedures (Hawaii, 1976). Similar laws now exist in most other states.

Special attention has been given to the treatment of breast cancer. Breast cancer is one of the most significant life-threatening risks for women. Treatment decisions are problematic due to a proliferation of alternative treatments, including the surgical procedures of medical mastectomy, simple mastectomy, and lumpectomy, and these may be combined with radiation therapy and various forms of chemotherapy. In some cases there is also a decision to prophylactically remove the other breast and/or perform a hysterectomy. There are continuing ambiguities over appropriate criteria and the relative risks of available alternatives, including risk to life, residual disability, and emotional trauma due to perceived aesthetic and sexual implications of treatment (Shain, 1980; Moetzinger and Dauber, 1982).

In 1983, the State of Hawaii passed a new law specifically addressing the decision-making for breast cancer based on a similar law passed the previous year in California (California State Department of Health, 1983; Hawaii, 1983). The Medical Board of Examiners was instructed to develop a standard form to be employed by physicians which would provide patients with information

regarding the alternative treatments available for breast cancer, along with descriptions of the possible consequences and risks associated with each treatment.

The new law is intended to increase the patient's role in the decision-making process. It goes beyond the more general requirement for patient consent in that it standardizes what information the patient is given and how it is provided. Thus this law formalizes the encounter between doctor and patient and attempts to establish patient control of decisions as a contract for specific medical services. From this perspective, doctor-patient transactions are placed within the context of a larger body of legal opinion concerning consumer rights. A patient is a responsible agent and a contractor for medical services and therefore has a right to decisions about those services.

LIMITATIONS IN IMPLEMENTING PATIENT CONSENT

Patient consent requirements have the potential to shift significantly the power of medical decision-making from the physician to the patient. However, the usual implementation of patient consent is designed as a formality which does not alter traditional doctor-patient roles. Despite legally mandated consent procedures, physicians have consistently resisted increasing patient participation in medical decision-making, and few patients exercise their rights to such participation (McIntosh; 1974; Haug and Levin, 1981; Faden, et al., 1981; Laforet, 1976; President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, 1982).

The remainder of this paper is devoted to understanding the limitations of legal efforts to actually increase patient control. These remarks are based on the author's interviews with several physicians with major responsibility for the treatment of breast cancer as well as observations as a member of the Research Committee of a major medical center. The limited success in changing doctor-patient transactions rests on 1) the professional understanding of medical responsibility shared by physicians and 2) the conditions of the doctor-patient encounter.

The Physician Conception of Medical Responsibility

Physicians perceive a dilemma between the emerging legal rights of patients and what they regard as the legal and moral responsibility they have as physicians for the well-being of their patients (Laforet, 1976; Edelman and Edelman, 1977). There are three components to this concern: physician control; medical criteria for success, and avoidance of patient harm.

Physician control. First, and most fundamentally, physicians are legally responsible for appropriate medical decisions which affect their patients. Patients lacking in expertise and clinical experience presumably are incapable of making good judgments about the efficacy of medical treatments (Laforet, 1976; Aring, 1974).

To illustrate, the new law in Hawaii expands the information patients receive about alternative treatments for breast cancer. One physician feared that the effect of the new law would be to tempt patients, based on wishful thinking, to insist on the least drastic mode of treatment. In some cases, this alternative could prove to be inadequate and result in death. He rhetorically asked, who was responsible for making the correct decision? Wouldn't the patient or the patient's family subsequently blame the physician? Thus physicians perceive themselves as legally and morally accountable for medical decisions. Deferring to the judgement of patients would place them in a potentially vulnerable position.

At the same time it should be noted that this physician, along with the others interviewed, favored educating patients about the nature of the medical treatment they were to receive and the reasons why that treatment was appropriate. These physicians provide information as a step to building the patient's trust and confidence in the treatment and achieving greater patient satisfaction with the outcome. Their discomfort was based on any attempt to dilute their exclusive responsibility for the medical decision itself.

Thus patient consent in the minds of physicians embodies two separable issues: 1) *patient education* or informed consent, requiring that physicians provide patient with reasonable information about medical procedures, and 2) *patient control*, giving the patient control over medical decision-making. Patient consent procedures accomplishing the first of these purposes were believed to enhance clinical effectiveness. Giving the patient control, however, was perceived as inconsistent with their medical responsibility and was the principal source of opposition to the extension of patient rights.

Medical criteria for success. A second problem regards the criteria for medical judgments. Traditional medical ethics are based on the principle of beneficence -- doing whatever promotes well-being and not doing harm (Shingleton and Shingleton, 1980). Physicians understand their responsibility to do whatever is medically possible to prolong life.

Patient consent procedures threaten to compromise this criterion of medical responsibility to the extent that patients emphasize values other than longevity. Thus a medically responsible decision cannot accommodate the case

of a woman who out of concern for appearance should refuse a mastectomy. Physicians are troubled by the increasing dilemma posed by patient objections to the possibility of prolonging life through new technology but at highly reduced human capacities and quality of life.

New models of decision analysis have been proposed for situations offering alternative treatment modalities which would incorporate the values of patients (Eraker and Politser, 1982). However formal decision analysis as a replacement for professional clinical judgement has been resisted by physicians (Schwartz, 1979; Brett, 1981). The logic-in-use in clinical situations continues to be predicated on a view of medical decisions as objective and scientific rather than incorporating patient values.

The author observed many instances of this problem in the deliberations of a hospital research committee. Experimental cancer treatments, for example, typically rely upon highly toxic drug regimens which carry high risk of permanent organ damage and high levels of discomfort and disfigurement for the patient. At best, the life of the patient may be extended a few weeks or months, but at great sacrifice of quality, and possibly also at great financial expense to the family. While members of the committee were aware of the problematic aspects of such treatments, they seldom raised them in the context of evaluating specific research proposals. Discussion was usually confined to the specific medical procedures, possible effects on the tumor, soundness of research methodology, completion of forms, and possible liability for the hospital.

On one occasion, a chemotherapy program was described for a specific cancer which had particularly severe side-effects, including nausea and permanent liver and kidney damage. The patients eligible for this program in fact had advanced forms of their disease, which meant that their survival was unlikely in any event. When asked by the author whether such patients might be better off without such a treatment, the physician proposing the program responded, "Other treatments have already failed with these patients. This represents one more treatment which we can try."

The response of this physician is indicative of what Scheff (1963) has described as the operating decision-rule in medicine: when in doubt treat. It is the duty of the physician to treat so long as a treatment is available. Physicians believe they should not destroy the hope of the patient and the patient's family. Indeed, patients and family members, initially and without much reflection, typically express the desire that every measure be taken. Nevertheless, increasing information about alternatives and giving patient's more control over decisions would likely undermine the sole concern with medical outcomes since,

upon greater reflection, patients are likely to consider outcomes in the light of other values.

Avoiding patient harm. Third, legally-mandated informed consent procedures are viewed as contrary to the physician's medical responsibility to avoid harm. Several physicians noted that complete disclosure of the possible negative side-effects of treatments, even if these are low risk possibilities, may heighten the patient's anxiety and may be therefore detrimental to the well-being of some patients. A complete disclosure of information may result in unnecessary psychological distress, a refusal to undergo needed procedures, and even suicide.

Indeed, studies have found that there are important differences among patients in their desire for and reaction to information (McIntosh, 1974; Shain, 1980). Some patients experience confidence and a greater sense of control by knowing the details of their disease and the nature of treatment procedures. Other patients, however, respond negatively to such information and prefer simple comfort and reassurance from the physician. These patients place their trust in the doctor's medical judgement. Legally mandating consent procedures undermines the clinical judgement of the physician regarding how to approach patients who differ radically in their desire for information and ability to cope with the complexities and ambiguities of medical decisions.

Several of the physicians interviewed about the new consent procedures for breast cancer patients noted that even many well-educated women had asked them to omit the details and simply "do what you feel needs to be done." Discussing their disease and the nature of medical procedures was highly distressing for these patients and from their perspective unnecessary, since they trusted the physician to make the best judgement.

Aside from increasing patient anxiety, physicians believe that the new requirements to provide detailed information about alternative treatments, have the potential to undermine patient confidence in physicians and thereby threaten good medical care and patient well-being. The fact of legal regulation itself implies that somehow physicians cannot be trusted to make decisions which are in the best welfare of their patients. Furthermore, forcing patients to participate in medical decision-making risks undermining the belief in physician competence and the efficacy of treatment. While medical decisions often entail a degree of uncertainty, physicians believe that the patient is better off maintaining trust that the doctor is in fact doing what is medically most appropriate in the situation (Aring, 1974; Laforet, 1976).

The Doctor-Patient Encounter

The above discussion shows that physicians have serious reservations about patient consent procedures which threaten their medical authority. However, the conditions of the doctor-patient encounter have greatly limited the impact of legal efforts to establish the rights of patients and increase their control over decisions. The structure of doctor-patient transactions is such that physicians are able to effectively constrain the level of patient participation in decision-making.

Physician control of the clinical encounter. Physicians control medical encounters with patients through verbal and non-verbal conditions in the situation. One obvious set of factors involves the high level of expertise of the physician relative to the patient and the esoteric nature of the medical language which disadvantages the patient from meaningful participation. In addition, the physician controls many other features of the situation, such as the imposition of time constraints on the interaction and the general syntax of doctor-patient discourse. Physicians exercise control over initiating the various phases of the encounter, turn-taking, and interactional opportunities for the patients. As a consequence patients have highly constrained opportunities for contributing information and for raising questions (Drass, 1982; Fisher, 1984).

The typical manner of presenting the patient consent form forecloses patient control over decisions. Despite the requirement that consent forms be comprehensible, they are often 4 to 6 pages long and contain highly technical descriptions of procedures and their possible consequences. Patients are given little chance to examine the details, besides which they are highly anxious and not in the frame of mind to carefully weigh the alternatives. The forms indicate the general availability of other treatments but provide no details about alternatives or specifics about the actual differences among them. The option of obtaining no further treatment is virtually never seriously presented to patients. Physicians usually present their intended treatment before presenting the consent form to patients; and indeed, sometimes the patients are already hospitalized before being asked to sign the consent form (Presidents Commission, 1982).

Thus, patient consent procedures are typically presented so as to carry out the requirement of informing the patient, while denying the patient an opportunity for making meaningful choices. The procedure minimizes patient questions and input, precluding serious patient consideration of alternatives, and thereby preserves the effective control of physicians over treatment decisions.

Patient background expectations. Physician dominance in the clinical context also rests upon the general frame of such encounters. As reviewed

earlier, the traditional doctor-patient relationship is based on a model of paternalism, analogous to the emotional dependency which a child experiences in relation to a parent, who is caring, knowledgeable, and in charge.

New models of the doctor-patient relationship have been proposed as more appropriate. Freidson (1970a) has suggested a conflict-negotiation model, based on the assumption that physicians and patients in some measure always have different interests at stake in the medical encounter. Health care reformers have suggested a collaborative model, especially for the management of chronic illnesses, where the physician and patient develop a joint strategy for managing disease (Szaz and Hollender, 1956; Shain, 1980).

The courts have adopted the role of consumer advocate to view patients as engaging in a contractual relationship with physicians where a potential conflict of interest exists between buyers and sellers (Betz and O'Connell, 1983; Reeder, 1972). This consumer model, however, rests on the assumptions that health is a commodity which can be sold in a market and health care consists of atomistic units provided by a seller of services. Such a mechanistic view of healing is fallacious and ignores the significance of the intrinsic emotional quality of the doctor-patient relationship (Aring, 1974; Carlson, 1975; Illich, 1976).

Research shows that the typical clinical situation remains closest to the traditional paternalistic model. Most patients enter the medical context highly anxious and desiring reassurance and comfort. They also hold background expectations that physicians have the exclusive expertise to make medical judgments and that a patient has a duty to passively cooperate. Patients expect the physician to make decisions, and they refrain from asking questions or challenging judgments. Only a small proportion of patients, typically those who are better educated, younger, and those with certain chronic conditions, actively question physicians and expect to participate in medical decisions (Haug and Lavin, 1981; Fisher, 1984; Lorber 1975) Furthermore, the emotional quality of the doctor-patient relationship is the principal basis on which patients evaluate their care (Ben-Sira, 1980).

In Honolulu, efforts to increase patient control in the medical context is likely to be especially difficult. Non-Haole ethnic groups generally have a traditional respect for authority figures and a desire to avoid face-to-face confrontations (Robillard, et al., 1983; Howard,1974). It may also be the case that non-Haole physicians perceive patients who ask questions and actively seek information to be aggressive. A more democratic and participatory model of doctor-patient encounters imposed by legal mandate is likely to fail in a context which violates cultural orientations deeply held by both patients and physicians.

DISCUSSION AND CONCLUSION

Formal patient consent procedures are now routinely implemented in medical settings. Physicians embrace patient consent procedures in so far as providing information to patients increases their trust in the physician. However, steps to increase patient participation in decision-making are perceived as threatening the medical responsibility of the physician and are vigorously opposed by the medical profession.

In fact, the widespread acceptance of patient consent procedures does not rest on an extension of *patient control* but on a rationale of *physician legitimation* (Betz and O'Connell, 1983). Medical malpractice suits and malpractice insurance constitute major costs to medical institutions and individual physicians. Patients are less likely to be able to mount credible malpractice suits if there is documentation that the patient was informed of the possible risks attending medical treatment and yet provided consent. Thus obtaining consent constitutes an act of patient submission to the authority and medical care of the physician.

In contrast, recent court decisions and legislation have attempted to formalize and extend patient rights. Legal requirements for patient consent have been intended to increase the control of patients as consumers over medical decisions which affect their lives. They constitute an extension of the general tendency towards greater formalization of social relationships in modern societies by rationalizing medical encounters into a contract between physicians and patients.

These developments are a reaction to recent changes in medical care which have undermined traditional social bonds based on diffuse obligations. The bureaucratization of medical contexts, the commodification of health care and patients, and the "proletarianization" of physicians have introduced many considerations into medical decision-making apart from the well-being of the patient. Developments in medical technology, furthermore, call into question the assumption that medical decisions are solely a matter of expertise and scientific neutrality. Alternative modes of treatment exist for many conditions, each associated with certain risks and drawbacks, and successful medical outcomes may have unacceptable results from the standpoint of non-medical values held by the patient.

Nevertheless, the evidence seems clear that legal efforts to increase patient control of medical decisions have had little actual effect on physician-patient transactions. Physicians are indoctrinated to assume the legal and moral responsibility to make the best medical decisions on behalf of their patients. In addition, the clinical situation preserves the dominance of the physician. Due to their esoteric knowledge, physicians are able to control their transactions with patients and believe it is proper for them to do so in order that the most appropriate decisions be made. Their advantage in controlling the situation enables physicians to implement consent procedures in a manner consistent with their own interests and perspective.

The attempt to rationalize doctor-patient transactions, however, has also failed for a more fundamental reason. Doctor-patient relationships do not conform to an impersonal contractual relationship, where the consumer is in charge. Patients enter medical encounters in a state of high anxiety, seeking relief from someone whom they believe has special expertise and capabilities. While individual patients differ in their circumstances, desires and expectations, many feel a deep emotional dependency on their physician. Healing is not a mechanistic exercise, but entails important processes embedded in the relationship between healers and sufferers (Frank, 1961). Thus, legal requirements based on a contractual, consumer model of client-professional relationships, try to formalize and standardize what is inherently highly personal.

Viable Approaches to Protecting the Patient

This paper has presented a skeptical view of the ability for legal measures requiring informed consent to regulate doctor-patient encounters in a manner acceptable to the perspectives of physicians or suitable to the needs of patients. Nevertheless, the intention has not been to suggest patients should not have a more active role in decisions which affect them. Indeed, the conditions of modern medical practice offer great risk to biasing medical decisions against the well-being of patients.

As an alternative to patient consent procedures, efforts to more directly change the structure of doctor-patient encounters may offer more promise in protecting the rights of patients to quality care and to a voice in the decisions which affect them.

Two well-known procedures provide some control over the quality of medical care. First, second opinions should be required from disinterested medical professionals prior to invasive medical procedures. Second, a fair amount of experience suggests that monitoring the quality of care by external bodies through the review of medical records, prescription records, lab samples, and so forth, does affect medical decision-making in favor of better patient care.

Two less widely implemented procedures have the potential to increase the participation of patients in decision-making by moving doctor-patient

transactions in the direction of greater collaboration. First, new nursing roles as patient educators and patient advocates can serve as a help to patients in formulating and articulating their values and concerns. Second, formal models of decision analysis can serve as a medium for physician-patient collaboration which would utilize both the medical expertise of the physician and the values and psychological concerns of the patients as input for making medical decisions.

Steps along these lines, may be more successful than patient consent procedures to build greater communication and trust between physicians and patients, because they do not try to impose an impersonal, contractual model of physician-patient relationships which is contrary to the desires of both physicians and patients.

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5 A Social Semiotics of Nursing*

ALBERT B. ROBILLARD

INTRODUCTION

This paper attempts to open up a way of considering the crisis in nursing, a problem of shortage of registered nurses, as the effect of the way nursing is defined in society. It is argued that nursing is a degraded commodity in a mass circulation of career commodity values, where the prestige values in a hierarchy of cultural capital are autonomy, sovereignty over the conditions of work and the ability to appropriate the capital generated by one's efforts. After considering the manner in which the nursing crisis is expressed, the redundancy of the problem of professional status and staffing in the history of nursing, we address the homology between the language of nursing career research and the reproduction of the problem by comparing this research to the feminist critique of sociology. We continue with a description of the types of nursing, focusing on inpatient hospital-based nursing as the locus of high turnover and constant nursing recruitment. We conclude that nurses are recruited from symbolically disprivileged sectors of the hierarchy of cultural capital and the same symbolic system that disprivileges these sectors also degrades nursing careers in the face of alternative prestige careers.

The approach of the paper differs markedly from most nursing personnel or career research. What is proposed is a social semiotics[1] of the way nursing is reproduced in a system of cultural capital.

THE EXPRESSION OF A CRISIS

It is said that there is a crisis in the ability to adequately staff inpatient and outpatient direct health care services in Hawai'i and across North America. Patient care units, even whole wings, have been reportedly closed due to the shortage of R.N.s. Surgery and other procedures are delayed because of inadequate nursing coverage. Many institutions in the United States and Canada report vacancy rates from 13.6 % to 25%.

Nursing agencies abound in the U.S., operating nationally and internationally, recruiting nurses for six month tours of duty. The recruitment of "flying" nurses is very common in intensive care. Up to seventy percent of nurses working in intensive care in Hawaii are flying nurses from out of state. Most of these nurses stay for only one contract period, three to six months, accelerating the circulation of nurses and the business of the recruitment agencies. Many nurse working on regular floors in Hawaii are flyers, as well.

When the story is projected out into the future it becomes even more frightening. North America has an aging population. The need for registered nurses will explode as the number of elderly people grows. Related, in part, to the graying of the population is the increase in acuity of inpatient care. More registered nurses will be required to deliver this type of hightech care. This is the care involving complex life support equipment. In survey after survey of future employment needs, registered nurses are among the fields expected to grow the most. It is pointed out that the number of students studying nursing are not enough to fill the anticipated short- or long- term need for nurses.

The nursing personnel problem has become a national problem in the United States and Canada. The governments have commissioned national studies and have formulated national strategies to meet the problem. In the U.S. the master text of nursing personnel assessment and planning is the *Secretary's Commission on Nursing* (1988), a two volume report from the United States Secretary of the Department of Health and Human Services.

Regionally, state and provincial departments of health have initiated similar studies and have sought ways to attract and retain nurses. Hospital associations in Hawai'i and across the nation and Canada have examined the problem (Healthcare Association of Hawai'i 1987). Consortia of university nursing departments, nursing associations, state and county health administrators and planners, hospital management, legislative committees, legislative auditors, and others have systematically investigated the problem (Hawai'i Task Force on Nursing Education and Service 1987). In Ontario, Canada's most populated province, there has been a spate of studies on the nursing situation: *The Nursing Shortage in Ontario* (Goldfarb 1988); *Report on Nursing Manpower* (Advisory Committee 1988); *What Do Nurses Want? A Review of Job Satisfaction and Job Turnover Literature* (Frisina, Murray, and Aird 1988); *Agency Nurses In Toronto: Who Works For Supplementary Nursing Services, And Why?* (Murray 1988); *Nursing Morale In Toronto: An Analysis Of Career, Job, And Hospital Satisfaction Among Hospital Staff Nurses* (Murray and Smith 1988); *Nurses Resigning Their Hospital Jobs In Toronto: Who Are They, Why Are They Resigning, And What Are They Going To Do?* (Murray and Frisina 1988); *Morale Among Registered Nursing Assistants In Toronto's Long-Term Care Hospitals* (Murray 1988); and *Report of the HCMT Nursing Manpower Task Force* (Hospital Council of Metropolitan Toronto 1988)

Added to this technical report literature is a further expression of concern about the problem in academic nursing and social science research publications (e.g. Barker, 1987; Curry, Wakefield, Price, Mueller, and McCloskey 1985; Kosmoski and Calkin 1986; Lowery and Jacobsen 1984), in the glossy nursing literature, or those periodicals read by most R.N.s (e.g. Ackerman 1986; Aiken

1987) and in the nursing management literature (e.g. Barhyte, Counte, and Christman 1987; Calhoun, Williams, and McCready 1988). These three streams of writing, though different, all focus, in large part, on how to assess the nursing shortage, how to plan for future nursing needs, and how to retain current nurses. One important feature of this literature, taken as a whole, is the generation and maintenance of a historical record of the problem. The present nursing shortage is not novel (Aiken 1987). It is a cyclical and chronic problem. It may be argued that the problem has existed since the beginning of the recruitment of young women to work as nurses.

A public or mass expression of the crisis can be found in the feature stories in the newspapers. Locally, the *Honolulu Star-Bulletin* and *Honolulu Advertiser* have run many stories about the nursing shortage. The problem is also represented in the paid public service spots on television, advertisements designed to show appreciation for nurses' work and attract nurses to the sponsoring agency. In Hawai'i the Department of Health has run appreciation spots. Kuakini Medical Center has run frank solicitations for new nurses. The Department of Health has used TV advertisements for recruitment for the neighbor island hospitals. Queen's Medical Center has used elaborate panels of oncamera interviews of nurses testifying to how much they enjoy nursing at Queen's. St. Francis Hospital has broadcast spots showing nurses at work. Now the State of Hawai'i has new recruitment campaigns, including T.V. spots, for professionals, nurses, social workers, and engineers. The T.V. ad campaigns for nursing recruitment have been episodic and reciprocal among institutions, when one employer advertises the rest tend to follow suit.

Responding to the information circulated in the mass media and to initiatives from hospitals and other agencies to use public capital or tax revenues to train more nurses, the state legislature has appropriated additional funds for schools of nursing. In Hawai'i, the legislature has increased support for the University of Hawai'i, Manoa B.S.N. program and for the two-year R.N. or A.D.N. program at Kapiolani Community College and at Maui Community College. The intent of additional support is to graduate more nurses for local institutions. In the context of the crisis proportion of demand for nurses, Hawai'i Loa College, a private institution, has a burgeoning R.N. training program.

The Queen's Foundation, associated with Queen's Medical Center, is supporting nursing education on Oahu at the University of Hawai'i and at Kapiolani Community College. The Foundation, set up by Queen Emma Kaleleonalani, has extensive commercial real estate holdings, primarily in Waikiki.

The problem of the nursing shortage reticulates through many social institutions. It is of concern to hospitals, physicians, professional nursing organizations, nursing training programs, licensing bureaus, university researchers, health services regulators and planners, the press, government and even advertising agencies. This concern is a practical activity, topically structuring and maintaining small, albeit significant, amounts of the substance of these institutions. By structuring we mean, in accordance with Anthony Giddens' notion of structuration (1981;1984), that this concern, topic of the nursing shortage, is knowledge at hand, a practice of symbolic exchange, used for building and reproducing interaction. In this manner, it structures institutional life, at least parts of institutions. This preliminary positioning of the nursing shortage crisis in an ontology of social structure is not equivalent to the position that the crisis is not real or that the crisis is relative to a specific configuration of social structure. That the nursing shortage is real, independent and objective is not at issue. How it is independent and objective is the target of a desconstructional analytic.

RECRUITMENT

There are other expressions of the nursing shortage crisis. One is the effort to recruit nursing labor. Recruitment takes multiple forms.

The first recruitment strategy is directed at the "active supply" of licensed registered nurses. There is a large pool of licensed registered nurses, about two million in the United States. Most of them are not working in nursing. There are 11,129 nurses licensed to practice in Hawai'i (Sakoda 1989). Among these nurses 8,487 reside in Hawai'i. The remaining 2,642 nurses live on the mainland and in foreign countries. Because of the large military population in Hawai'i, many nurses come into the state, work for the duration of a husband's tour of duty, and then move on in the next assignment. One estimate of the number of R.N.s working as nurses in Hawai'i is 3,501 (Hawai'i Task Force 1987, p. i). This means that less than half those licensed and living in Hawai'i are working in nursing.[2]

One recruitment initiative has been to attract licensed nurses who are not currently working in the field. This has included advertising in the newspapers and on television. The Office of the Legislative Auditor in Hawai'i has sought to learn if more people can be employed from this pool if job sharing were offered in nursing positions (Robillard, Johnson, and Robillard, 1989). While most surveyed R.N.s in Hawai'i are in favor of job sharing, less than 10 % of 4,849 mail survey respondents plan to take a shared position in the next two years if such a position were offered. The attraction of nurses to shared positions, as a labor recruitment strategy, is less than anticipated.

Operation Nightingale is a project funded by the State of Hawai'i, designed to provide additional training to foreign-trained nurses. The training is both clinical and didactic. It has the objective of recruiting foreign-trained nurses who are already resident in Hawai'i, providing the extra experience to enable them to pass the State licensure examination. The program has been successful in having 90% of its graduates obtain licensure as R.N.s. The program has about thirty students in each cycle of training. Most of the students are Philippine trained nurses. Many of the Philippine trained nurses have been working in health care as L.P.N.s or as nursing assistants. Previous to State funding, the program was supported by the community hospitals, providing a channel of upward career mobility for nurses employed by local institutions.

Another recruitment strategy has been looking overseas, primarily in Ireland, the Philippines and more recently in Taiwan and Korea. One large hospital on Oahu has recruited from Ireland. The Hawai'i hospitals have not recruited from the Philippines. There is a substantial family reunification migration, also known as chain migration, to Hawai'i from the Philippines. Most of the Filipino nurses working in Hawai'i have come through family sponsored immigration.[3] However, the *Manila Bulletin* is full of large display advertisements for clinical nurses from metropolitan hospital systems on the U.S. mainland, principally from the east coast cities. Up to over 90% of some of the graduating classes from the University of the Philippines College of Nursing are working in the United States or Canada.

A new source of nurses is New Zealand. The Board of Nursing in Hawai'i has taken special measures to give temporary licenses to these nurses. However, the New Zealand government is not too happy about losing nurses to Hawai'i, or anywhere else. Most of them have been trained at public expense, from tax revenue-supported institutions. New Zealand has experienced an outmigration problem, exacerbated by an economic recession and a low population. New Zealand is arguably not a peripheral country in the world economy but the shift of trained nurses to Hawai'i and North America is a shift in capital resources. The United States is meeting its need for nurses, in part, by transferring the fruits of capital intensive training from other countries. There is little cost to the United States in recruiting nurses that other countries have paid to train.

In the Philippines the overseas nursing market in the United States, Canada, Australia, Saudi Arabia, and Europe has distorted the number of students in nursing schools and the numbers of licensed nurses in the country. The Philippines has a surplus of nurses. This is a concentration of public and private capital which could be used for alternative ends. The Philippines, India, Afghanistan, Pakistan, South and Central America, and now Ireland, New Zealand, and Canada have been free resources of trained medical personnel, at no cost to the United States.

THE REDUNDANCY OF THE PROBLEM

The shortage of nurses is not a new phenomenon. Nor is it new to research. It has concerned professional nursing associations since the turn of the century. Problems in nursing, like the shortage, have the status of unsolved social problems.[4] An unsolved social problem is chronic. It does not get solved because its problematic character structures not so much a solution as it maintains a set of social institutions.[5] We will return to this discussion below.

In 1901 the New York Nursing Association surveyed its members about a number of issues. Among them were: (1) educational requirements for practice; (2) title for nurses; (3) job design; (4) recruitment; (5) career development; and (6) turnover. At the turn of the century, nursing or what was considered the work of females in health services was in a transitional state. Like medicine, it was being increasingly articulated as an independent way of making a living, a full-time occupation (Starr 1982). Nurses were maneuvering for some degree of control over their work in the emerging and rapidly expanding institutional structure of a health care system. The work of nurses was rapidly changing from the informal and independent curing ministrations of women, in a largely agrarian economy, to a cash compensated job in the context of a complex division of labor. The role of women in the delivery of health care services was transformed from a life long-avocation, handed down within families, to a proletarian vocation, subordinated to the physician and to those who bought their labor time.

In 1903 North Carolina became the first state to license nurses. Previously, nurses had established registries, with minimum requirements for training. These registries were like membership in the Better Business Bureau. Membership was not required to practice. With licensure by the states, entry into nursing practice became legally regulated and integrated into a system of accredited schools of nursing. Soon licensure examinations were established. These examinations evolved into the standardized national examination currently used by all states and territories in the United States. In Hawai'i, the Board of Nursing, a division of the Department of Commerce and Consumer Affairs, administers the examination.

Many of the early schools were free-standing hospital schools of nursing. These schools were not affiliated with a college or university. However, as health care became more and more technologically complex, particularly after World War II, the training of nurses was shifted to public and private

universities, with substantial basic and science educational requirements. It should be remembered that the shift to university-based training was not so much a technological imperative as the rationalization and ascendancy of capital bourgeoisie, their philanthropic foundations, and the increasing vertical national integration in mass production and distribution and in penetration of government in everyday affairs (Brown 1979).

Even schools of nursing in a private university received public funding from the U.S. and state governments. The costs of nursing education have been incrementally transferred to the public. The same can be said of the training of physicians. Federal research grant overhead (an additional outlay often 65% of direct costs), construction and capitation grants underwrite over half of the cost of medical education at some institutions. State financing also plays a substantial role. Tuition plays a minor role.

With licensure and accreditation of schools of nursing, in the late 1960s, the American Nursing Association and the National League for Nursing began advocating, a further increase in standards. The two organizations have proposed that the professional registered nurse should have a bachelor of nursing degree (B.S.N.), a four or five year curriculum. The product of the two-year training program (A.D.N.), usually located in community colleges, would be downgraded to an associate nurse. At present in Hawai'i the two-year nursing program is offered at Kapiolani, Maui, and Hilo Community Colleges. The University of Hawai'i at Manoa used to offer the A.D.N. program but it was transferred to Kapiolani Community College.

This proposal had the manifest objective of creating a professional identity, better pay, and increased autonomy for nursing. The proposal was to increase the quality of health care and stabilize the career paths of nurses. The proposal has not been adopted in most states, including Hawai'i. While the nursing organizations argued that this would attract and maintain a pool of working nurses to meet national needs, the primary employers of nurses--hospitals and governments--have effectively resisted the proposal. The employers argue the two-year nurse or A.A. nurse programs provide the "troops" in the nursing corps in any institution. They say that the B.S.N. prepared nurse is often dissatisfied with the field because of unrealistic high expectations and too frequently enrolls in a master of nursing program, thereby limiting availability to clinical work. Supervisors of nursing recruitment and personnel management say they already have too many master's nurses.[6]

The interests of the employers of nurses apparently have not been the same as the interests of nurses in professionalization. While the nurses have sought autonomy and sovereignty over their own affairs (the *sine qua non* of a

profession, as in medicine, law, and theology), the employers have sought to maximize their access to a stream of newly trained nurses. We emphasize the interest is in new graduates, young, unmarried individuals at the bottom of the pay scale, who are professionally unsure of themselves, and who are relatively complaint.[7] The employers feel that if the B.S.N. is the threshold to nursing practice, they will be denied access to the community college trained nurse in an occupational field with a reputation (a reputation which may be more rhetorical than real) of high turnover and a short active work life span. The employers expect nurses to leave the field after four or five years.[8] The vision the employers have of the increase in the standards of licensure is that it would cut off an important source of nurses.

Throughout the long quest for sovereignty in the United States, a state that continues to elude it, nursing has been researched on an annual basis. There have been studies and revisions of nursing curricula. There have been studies of the nursing labor market, compensation, career development, work satisfaction, clinical skills and performance, record keeping, foreign nurses, and even research on nursing research. This is to mention only a few of the nursing research categories. The point here is to demonstrate that nursing is a well-researched field. The research has been conducted by nursing school faculty, nursing associations, hospital associations, and the government. The financial support for the research has been from the hospital associations and government, the primary employers of nurses.

When we were asked to research nurses in Hawai'i by the Department of Health and the Board of Nursing, Department of Commerce and Consumer Affairs, we were struck by the recurring nature of the issues of high turnover, recruitment, job dissatisfaction, and requirements for entry into practice. These issues have been on the table since the late 1880s. In reviewing the literature for our research on nurse retention in the services operated by the Hawai'i Department of Health and for our research on the entry into practice issue for the Board of Nursing, one of us began to think of Friedrich Nietzsche. Nietzsche postulated the law of eternal return, the same things keep being reproduced through time, thereby maintaining the sensibility and order of experience. We began to wonder if the research questions about nursing preparation, recruitment, and retention have remained the same for a long time--at least at a level of abstract equivalence--what this constancy represented. We began to conceptualize the problem of nursing as a recurring conversation, being used to reproduce a social order in the same way Anthony Giddens talks about knowledge-at-hand being used interactively to structure a social order. We began to think that if the issues were recurring, without solutions, maybe the approach or posture--including the assumptions--of the research and the problem it sought to solve were not "supposed" to change. Perhaps the research and its

political application (including recurrent calls for more research on the same topic) serve to mystify and maintain the structure of the problem, a chronically unsolved social problem.

FEMINIST SOCIAL THEORY

The fleeting reference to Nietzsche and the law of eternal return of history made us start to think we might survey and interview nurses, counting and associating responses to variables of interest, forever without learning why nurses work for a few years, become alienated, leave the field, and cannot be enticed back to the field. Counting is not useless but we recognized--maybe from the volatile phone calls and letters we received from nurses in connection with our survey research--that the semantic categories which defined our measure variables are from a vision of a social order. Their use reproduces this vision. Many of our respondents were not happy with this Giddens-like structuration. Our interview and survey schedules were deductive extensions of preceding research and were developed in collaboration with nursing management in the Hawai'i Department of Health and the Board of Nursing. What our respondents said to us in the calls and letters (including three threats of lawsuits) was that they felt subordinated by the language of the survey schedule. They said the language of our questionnaire carried forward the problems of nursing employment and as such are incapable of detecting the organization of the problems, no less offering solutions.

We did not know what to do with the reorientation of our attitude about nursing shortage research until the February 1990 issue of the American Sociological Association's *Footnotes* arrived. *Footnotes* is the Association newspaper. In this issue there is a shockingly naive attack on feminist theory, "The Trouble With Feminist Theory," by Michael A. Faia (1990). Until the Faia article we did not know much about feminist theory. It had been sequestered beyond the pale of funded research. We still do not know enough about feminist critical theory.[9]

Faia, like someone from the European Enlightenment, argues that positivistic sociology is value neutral and as such it can only serve the interests of feminists in righting injustices. He cites the work of legendary female sociologists as examples of the proper utilization of positivistic methods. He is arguing against the thrust of the assertion, exampled by Stacey and Thorne (1985), that the methods and theoretical orientations of sociology assume, albeit unconsciously, a social order, one repressive of women and subordinate classes. The feminist critique of sociology has gone right by Faia. Obviously, it takes some knowledge of the constitutive role of language to understand the feminist critique.

Now we have moved to the tentative position that the research on nursing and the shortage has been informed by the same language that constitutes, institutionalizes the problem. This is biting off a lot. To begin to explicate this position, we will discuss a number of issues: (1) The unconscious reification of capitalist power and proletarianization of women in nursing personnel research; (2) The subordination of nurses to science; and (3) The attempt to set-up an independent science of nursing based on the phenomenology of the person.

The research on nursing personnel, such as that cited above, can be characterized as highly focused. The research zeros in on nursing, framing it closely as an occupation, neglecting the wider phenomena of why people are compelled to seek full-time employment, to undergo training to make their labor saleable in the capitalist division of labor and commodified exchange. Without becoming a pataphysist, or one who adores romanticized versions of traditional cultures, we can say there are other ways to spend your life than as a fulltime proletarian.[10] The usual approach of nursing research assumes a background of wage employment and treats entry into nursing education and practice as individual choices, rather than the channeling effects, the limitation of horizons, by class position. Because of the unquestioned assumption of proletarianized society, already divided up into occupations, how one could come to view this kind of social order as the natural reality is undescribed. Further, because of an essentialized individualism, how this kind of naturalized proletarian social order differentially recruits segments (like upper-lower and lower-middle class women for nursing (Muff 1988, Reverby 1987) of the population to the occupational structure is uninteresting. The entire circuitry of a system which prepares individuals, mostly females, for nursing employment and who become, because they are individuals, dissatisfied and alienated with nursing is literally a priori to where nursing research begins.

We are suggesting a political economy investigation of nursing education, entry into practice, and the shortage. That it seems beside the point, that nursing appears as a fully formed employment field meriting our complete attention, is a noncritical posture toward the social institutions which reproduce the unsolved and chronic problem of a nursing shortage. We concede that the vocabulary of proletarianization, division of labor, capital, naturalization, class, and the method of studying nursing vis-a-vis a political economy of the entire society may sound strange and far out. They are items from a Marxist lexicon, even though no attempt is made here to represent a Marxist or neo-Marxist perspective. But as in the feminist critique of sociology, the use of a vocabulary representing what is apparent about the vocational order and about nursing simply reifies the existing society. This is not analysis but, rather, acting on behalf of the values, ideologies, opinions, vocabularies, and deep assumptions

which naturalize or make normal, over the life of professional nursing in the United States, the short-term working career of women in nursing.

Moreover, the absence of a political economy of nursing in nursing research leaves unavailable or at least marginal the values that draw women into nursing, values which may not be easily commodifiable, as a sustaining basis of the structure of nursing. The value of political economy will have to stand here as an assertion. There is insufficient space to demonstrate a political economy of nursing here. We will explore it further below in the discussions of science in nursing and in the attempt to found a science of nursing in the phenomenology of caring.

Many nursing leaders subscribe to the idea that nursing has to become more scientific if it is to gain the autonomy of a profession. Will the study and practice of science really make nurses sovereign over their own affairs? What is the status of laboratory technicians or radiological technicians or inhalation therapists, people who work within a relatively more confined scientific circumspection than nurses? Nurses are not only responsible to science but to the practice of "caring," or the skills of face-to-face communication with the patient, giving emotional support and patient education, among other tasks (Benner and Wrubel, 1989).

It is apparent that science is not the tail that wags the dog in health care career status. For example, a physician who earns a Ph.D. in a science, as in computer science or rehabilitation engineering, and elects to pursue the practice of the science in the context of health care has a lower status than the clinically active physician who does not have a Ph.D. More is involved than the practice of science in professional sovereignty.

Recently, Benner and Wrubel, in *The Primacy of Caring*, have sought to formalize the process of caring, thereby giving nurses an independent role. This effort seems to recognize the fact that most nurses are not scientists, in the sense of creating new scientific knowledge for health care. The average floor nurse, the clinic nurse, and the state public health nurse are not basic research or clinical scientists in the sense of publishing their work in *The New England Journal of Medicine, Lancet, Nature, Nursing Research*, or any of the basic science disciplinary journals. The science in clinical nursing is derivative, as it is in the everyday practice of medicine. It is learned and practiced by nurses but rarely created by clinical nurses. Nursing school curricula are not geared to producing hypothetico-deductive scientists in physics, the life sciences, computer science, engineering, or any other applied science. The training in nursing in mathematics, chemistry, logic, physics and other sciences is not enough to be prepared to enter the sciences as a practitioner of basic research. Except for the

first two years of nursing study, when a liberal arts experience takes place, students are relatively isolated from bench science or the hands-on practice of any scientific discipline. Furthermore, nursing students are recruited from social classes unlikely to become scientists and go mostly to colleges and universities which supply few research scientists. These are "teaching schools," the state colleges and universities and the community colleges, largely without Ph.D. programs in the sciences and the federally funded research infrastructures. There are nursing schools at elite universities but the number of nurses graduated from them is small, compared to the number produced by non-research universities and colleges.

Even the nursing faculty who have Ph.D.s have them mostly in disciplines other than nursing, usually in the social sciences or in education (Ed.D.). There is now a doctorate in nursing and it is receiving vigorous support from nursing leaders. The degree is a Doctorate in Nursing Science, or the D.N.S.[11] Some universities offer the Ph.D. in nursing. But nursing faculty who have Ph.D.s in the social sciences, education and even the "hard sciences" are not mainstream practitioners of their graduate training disciplines. They teach, research and write about nursing, a multidisciplinary applied field. Benner and Wrubel (1989) have tried to distill what nurses do best or should do best and have prescribed the role of nurses as providing "caring." They have tried to create a new science of nursing built upon a Heideggerian phenomenology of the person (Heidegger 1962).

If everyday nursing is not doing disciplinary science, if nursing education does not prepare scientists and if nursing faculty do not practice disciplinary science, will the scientificizing of nursing really bring the hoped for autonomy of nursing? We think not. It is clear from the other sciences in health care that science in itself is not the path to high status and professional autonomy. A more serious question is if nurses do not do disciplinary research, researching instead the applied field of nursing, and if nursing is creating its own doctoral programs and if the likes of Benner and Wrubel are attempting to provide an independent theoretical basis for nursing, maybe nursing has a free-standing core of knowledge and practice different from disciplinary science. We will argue, in part, that nursing has little power over its own affairs because the core of nursing, caring, is institutionalized at the margins of the commodified exchange system. In fact, nursing, as primarily the work of females, is institutionalized on the margins of commodified exchange. As women who are housekeepers for their families, raising their children, cooking and maintaining shelter, thereby reproducing the force of laborers and consumers without compensation, nurses provide relatively underpaid work for a system that depends on labor intensive and diffuse "caring" to function financially. Capitalism depends on uncompensated and underpaid sources of production, domestic household work

carried out by females and publicly financed infrastructure (schools, roads, hospitals, police, courts, harbors and airports, to mention but a few) to, in part, create a surplus for private appropriation. The tremendous differential returns on capital in health care depend on the undercompensated labor of nurses, as well as the low paid work of others in health care.

The notion that nurses do caring as the centerpiece of their work and its proper execution is based on a Heideggerian definition of the person does set out a horizon of nursing sovereignty as a profession. However, is this formalization of nursing knowledge nothing more than a retreat into a rhetorical position? We are struck, however popular phenomenology is in nursing, at how much things would have to change if the kind of nursing Benner and Wrubel advocate were put into general practice. The assignment of nursing contacts with the patient and the number of nursing hours per patient would dramatically increase. The program of Benner and Wrubel and others like them ignores the locus of control of health care units: the rational calculation of treatment against outcome by the rate of reimbursement from insurers and government programs, like Medicare and Medicaid. If the phenomenology movement in nursing does not fit the acuity of nursing care systems figured out by Big Eight accounting firms, such as Peat Marwick, designed to calculate simultaneously with the Diagnostic Related Groups (DRGs), the program is merely a pipe dream of academic nursing.[12]

The phenomenology of caring, as the unique science of nursing, is highly attractive on humanistic grounds. Perhaps the attention on the subject, the individualist grounds of its European humanism, and the exclusion of the social are really indications of a socially structured ignorance of power (certainly not unique to nursing). The structured avoidance of discussing the problems of implementing a program of phenomenology of caring, depending on the rightness of the idea to win the day, mystifies members of this discourse, reproducing the conditions of the subordination of nurses, as well as the impersonal character of health care. The nurses who practice this discourse--and all of us are partial members of this classical Enlightenment vocabulary--cannot find or formulate the structure of subordination of nurses.

There are other problems with the phenomenology of caring. Among them are the Eurocentric basis of the person, the structure of the subject. Another is in ignoring the social it becomes an elitist ideology, iteratively mystifying the nursing faculty who produce it.

THE WORK OF NURSES

We have to back up for a short digression on the range and nature of nursing labor. There are many kinds of work under the label of nursing. There are nurses working in the traditional hospital roles in acute care: medical-surgical, critical care, OB/GYN, pediatrics and inpatient mental health. In Hawai'i, our survey of all licensed registered nurses generated data to indicate that 64.78 percent of RNs work in acute care settings in hospitals (Robillard, Robillard, and Johnson, 1989a). This figure may be higher (70.31%) if we add the nurses working in geriatrics (5.53%), often in long-term skilled nursing facilities. Other nurses work in nursing training, patient education, ambulatory care, administration, home care, community health, school health, community mental health, maternal and child health, health planning and for insurance companies. However, the numbers and percentage of nurses in each of the non-acute care categories is low.

In a separate interview study of a sample of 300 nurses employed by the State of Hawai'i Department of Health the distribution of nursing assignments were the following: medical-surgical 12.3%; critical care 7.35%; OB/GYN 6.0%; emergency room 5.3%; operating room 3.0%; inpatient pediatrics 2.7%; inpatient psychiatry 7.0%; long-term skilled nursing facility/intermediate care facility 12.7%; long-term facilities for the mentally retarded 4.3%; long-term psychiatric care 3%; community and home care 25.3%; administrator 3.3%; supervisor 2.7%; alcohol abuse 1.3%; other 3.3%; don't know/refused .3% (Robillard, Robillard and Johnson 1989). Among nurses employed by the State of Hawai'i 43.65% work in acute care. Add to this the percentage working in long-term care facilities and the institution-based nurses are increased to 63.65%, beginning to approximate the distribution of nurses at large in the State, both in the public and private sectors. In Hawai'i the State operates hospitals on Maui, Hawai'i, Lanai, and the TB and Hansen's Disease hospitals on Oahu (Leahi) and on Molokai (Kalaupapa), Hawai'i State Hospital in Kaneohe, several facilities for the mentally retarded and multiple long-term care facilities. The point is Hawai'i, unlike most other states, operates general community acute care hospitals and may have a higher ratio of RNs in the State Department of Health in acute care than other states.

The focus on ratios of RNs working in acute care settings and other institutional circumstances has a rationale. First, nursing is very heterogeneous, with many dissimilar skills and different levels of technological sophistication. Nurses are not functionally interchangeable. Second, our research on nurses in Hawai'i found a greater career satisfaction and relatively low turnover among public health nurses and free-standing State-operated outpatient clinics than in hospital acute care settings, both private and public. The nursing shortage is

concentrated in the acute care services of hospitals, where most nurses work and where the public imagination places most nurses, uniformed, moving from bed to bed twenty-four hours a day.

Acute care nursing is labor intensive. It requires twenty-four hour staffing, divided into three shifts. One dimension of labor intensity is that a shift is rationalized into a schedule of cycles of repeated procedures, like vital signs or changing IV fluid bags, and single time events, as in a patient shower or a stool sample. This rationalization is tight as the discrete continuum of the shift is composed--for the nurse and supervisor, alike--of these cycles of repeated and single events. There is no time out in nursing coverage of patients, except for scheduled breaks and even then coverage arrangements are made for absent nurses. The intensity of the labor in the entire shift is subjectively and objectively claimed by a sequence of duties. Floor nursing requires stamina and able-bodied people. It is an on your feet and lifting kind of work.

Except for medical residents, where they have them, RNs are the top tier of in-house medical staff, carrying out treatment plans ordered by physicians and supervising LPNs, nurses' aides and ward clerks. They interact, also, with the technical staff, e.g. respiratory, radiology, laboratory and others. RNs and residents are in direct communication with the patient's physician, both during rounds and by telephone. RNs are the implementors and managers of most bedside care in most hospitals.

This work is routinized, with a procedure for every contingency, and often performed under the stress of having to deal with extremely ill patients. Actually, there are two issues here. One is routinization and the subordination to regimes of treatment decided collectively or by third parties, like physicians or, even, accountants (see above). While the hospital department of nursing administration will plan--within national standards--nursing procedures, the individual floor nurse will have little freedom in carrying them out. There is an overriding notion of effective medical procedure and responsibility, requiring equivalence between the sequential implementation of the same procedure across multiple implementations. The idea of step-wise equivalence in effecting the same procedure, with little tolerance for deviation, produces its own kind of stress. Not everyone can perform in an environment where actions have a constant and an equivalent identity, especially as health care becomes more and more technological, embedded in unforgiving computer digitalization. This may be responsible for some of the high turnover in acute care, people without proper educational backgrounds or without the necessary cognitive orientation are filtered out or transfer to less demanding nursing environments.

The second issue is the reaction to dealing with acutely ill and terminal patients, people who are often disfigured by wasting, surgery or accident trauma. Most people die in the United States in acute care hospital services, like oncology, cardiac care, intensive care, and medical-surgical, and nurses are the first contact with death. On busy services death is an everyday phenomenon, made increasingly so by a rapidly aging population and a rising level of patient acuity.

Death, disfigurement and any form of physical decline are the *sine qua non* of failure and debasement in American youth-oriented culture. Death is sequestered in hospitals in a proletarianized society of full-time wage employment. No one has time to care for the dying. It is not that death, disfigurement and decline are inherently undesirable, no less unexpected, but that American social and economic structure and the cultural knowledge used to construct and maintain it systematically disvalues death and illness, to the extent that mere presence to dying, death and disfigurement may reflexively erode one's sense of competence. It is as if there is no future with the presence of death or physical decline in a secularized America, where gods and an after-life have long since departed (Baudrillard 1976). Death work and dealing with patients with irreversible illnesses are warrantable reasons (expressed in conversations heard everyday throughout the society) for leaving hospital nursing and for leaving the care of the sick, generally (Sontag 1988).

One last factor deserves attention, albeit all too brief. We have already mentioned the dependence on relatively low wage labor of nurses for the generation of capital and we have talked about the labor intensity of nursing. However, we have not directly addressed the issue of the appropriation of the generated capital and what may happen to the consciousness of nurses in the face of this appropriation. The greatest percentage of the total annual national health care bill is spent on hospital care in the last six months of the patient's life, usually on life-extending treatment requiring intensive nursing. Hospital suppliers, manufacturers, administrators, physicians--indeed the entire medical economic sector--relies on hospital-based care for maximum capital growth. The capital growth generated by nurses is not appropriated by nurses and to even consider a claim by nurses to the capital produced by their work--above the prevailing wage for nurses--can be said to be confused about the ownership of productive capital, including the labor of nurses. Nevertheless, nurses are acutely aware they benefit differently from their labor than do physicians, hospital management, and the owners of medical investment capital, even at $19.00 per hour.

Nurses are hourly employees, not withstanding the rhetoric about nursing being a profession. Nurses sell their labor and the time and fruits of their work

are owned by the institutions that employ them and are appropriated by physicians and investment capital suppliers of the health care industry. The maintenance of the hourly labor contract belies any comparison with physicians and management. The authorizing symbolism of greater professional freedom, of charging fees or being in charge of capital (physical plant or admitting patients), is not available to nurses.

It is an irony of social structure that the proletarianization of women into nurses, and the general society-wide division of labor, are the conditions of a calculative and accelerating individualism, the basis of discontent. Nurses are leaving nursing to take other employment because of dissatisfaction with the relative rewards of pay or because of a feeling of no personal future in the field, often feeling taken advantage of or being uneasy with strict subordination to routines of care, physicians and management. More nurses are working outside of nursing than in nursing. Moreover, as we will argue below, nurses are leaving nursing because nursing is symbolically presented in society as a transitory female occupation.

CONCLUSION

We have argued that the nursing shortage and related problems of standards of entry into practice and licensing are not new. They have been chronic problems since the rationalization of nursing into full-time wage employment. In part, the history of nursing since the late 1800s has been the unrealized struggle for professional autonomy and sovereignty. We suggested that the redundancy of the problem, even after decades of research, may lie in the unexamined premises of the language used to formulate the problem, what is assumed and what remains silent, not even capable of formulation. To illustrate this point, we used the analogy of the feminist critique of sociology.

An ethnographic observation was entered on the resistance by nursing employers to raising the preparation of nurses to the bachelor's degree, the BSN. Employers say they must maintain access to the two-year-curriculum trained nurse, mostly from community colleges, to meet staffing needs. Access to a stream of newly-trained nurses is considered critical. In fact, there is a stated preference, by some employers, for nursing graduates of two-year programs. Some reluctance was expressed about "over-educated" nurses, meaning they wanted "troops" and not nursing leaders, of whom they had an ample supply. The personnel officer's problem is conceived as continual replacement of floor staff nurses who work for a comparatively short number of years. Observations were also made on the recruitment of nurses, both as an indicator of the shortage and as an example of uneven exchange between the United States and Third World suppliers of nurses. Hawai'i has only recently entered into direct

recruitment of foreign nurses, having relied on Filipino nurses who migrated to Hawai'i in family reunification immigration. Philippine trained nurses comprise a substantial number of the active clinical nurses in Hawai'i.

The desire to maintain recruitment from two-year training programs and the expansion into overseas recruitment reveal the implicit inscription of gender and class subordination of nursing. The maintenance of the "fiction" or the rhetoric of nursing being a short-term career of females permits the structure of nursing jobs, possible changes in terms of employment, and the exploitation of women, made possible by such rhetoric, to remain hidden. Furthermore, the class origin of most American nurses and the attraction of foreign-trained nurses--amplified by structured rapid turnover--maintains the class hegemony of physicians and hospital management. Such nurses are well ordered and orderable in a relatively integrated hierarchical system of values and symbolic codes, where the differential access and performance of cultural capital is one of the class sorting mechanisms.

In Hawai'i it is no mistake that the health careers program financed by the private hospitals and the State is focused on Farrington High School in Kalihi. One might ask why the health careers program (nursing and allied health) are not focused on Kalani High School in Kahala or at Kaiser High School in Hawai'i Kai. These high schools and neighborhoods are far different from Farrington High School and Kalihi, an area that has traditionally been the home of recent immigrants, native Hawaiians, and the working poor. Kalihi has been through successive waves of migrants but today may be characterized as having a large Filipino and Samoan population. Good intentions aside, the concentration of health careers recruitment in Farrington in Kalihi is a statement and class channeling device of where these careers fit in the structural hierarchy of Hawai'i, what cultural skills are needed and not needed and, moreover, the differential access that children from various neighborhoods have to the cultural capital of controlling their own employment and career development. Women in high school in Kahala and Hawai'i Kai, if they are not in private school, where the occupational orientation is even more pronounced, are planning careers in the professions, finance, university professorships and commerce. Nursing is literally below them.

Nursing is a broad field of employment, with many different specialties and career development paths. However, it is in hospital, inpatient care where most nurses are employed and where the turnover is the highest, and the shortage is concentrated. We have characterized this work as routinized and increasingly tied to technology. The work is composed of repeated and single sequence tasks for the entirety of a shift, hence the labor intensity of nursing.

The work is tied to the symbolism of the labor contract, hourly wages. Nurses are the front line of acute care but have, because of the labor contract, no claim to the enormous capital growth their labor in large part generates. Nurses implement the orders of physicians, who are largely absent from the service floor, except for rounds and in emergencies. Capital growth is appropriated by physicians, hospital management, suppliers and equipment manufacturers, among others, and, yet, it is the labor of nurses which in large part is responsible for the implementation of care and the consumption of equipment and supplies.

Routinization, labor intensity and the expropriation of the fruits of labor are not new and not intrinsically sources of complaint. Traditional and class divided or feudal societies certainly were composed of agrarian routines and rituals and the chiefly elite and the lords of the manor expropriated their measure of production (Giddens 1981). This is still happening in agricultural societies, where the under classes have been socialized to think of themselves as lesser beings than the elites, to whom they willingly give a large measure of their production. In modern societies this is decidedly not the case.

In modern capitalist societies[13] upper class values of self-determination are circulated throughout the social structure, almost as if a commodity for sale and upper class status emulation. This context permits the realization of relative deprivation of those employed in routinized and subordinated jobs. As we progress into a postmodern social structure, where signs are the main product, the desire for a self-determined career with professional autonomy and access and control of the capital generated becomes a prestige commodity. The free circulation and consumption of signs in society opens up unlimited possibilities and unhappy comparisons among those subjects formed, socialized within an "information" society. Upper and middle-class women in American society are already within the self-hermeneutic circle of autonomous careers and increasingly regard nursing as a low status job.[14] Lower-middle and upper-lower class and foreign women are not as firmly embedded in the same milieu (the information society of infinite possibility) and more readily accept, at least rhetorically, and are targeted for nursing recruitment. Once in nursing, however, and as the circulation of prestige signs penetrates more and more of society these recruits have the same structural grounds for unhappiness with hospital nursing.

The structure of the problem of contemporary nursing, and perhaps over a longer term, is that it is lodged in a social system that recruits females from the literate lower middle and upper lower classes and at the same time commodifies all prestige values, presenting and diffusing throughout mass society alternative autonomous careers and the foundations for comparative discontent. The rhetoric of the hierarchy of cultural capital, the vertical array

of values and signs, increasingly subject to com-modification, defines the dimensions of society: who knows the dimensions; who does not know the comprehensive dimensions; who has the right to inform who about what it means to be "informed"[15]; who has the duty to learn from the "informed"; who should be restricted or unrestricted to acquiring what job skills; and even how long a nursing career should last before it becomes a degraded commodity. Nursing employers, nurses themselves, and nursing training programs, albeit implicitly, inhabit a structure of commodified symbolic exchange wherein all become mutually reinforcing poles of formulating nursing as an unrewarding career, requiring a constant stream of new recruits, like the enlisted ranks of the armed services.

NOTES

* This is to thank Divina Telan Robillard for timely assistance in writing and completing this paper.

1. We are using semiotics as a theory of signs but with the following qualifications. First, the world is not reduced to a positivistic reality of signs or some linguistic construction, as the world as constructed by language. Second, we are not using the theory of signs as a metaphor, as the world as if it were constructed by language. We are using semiotics or signs as a topic, a referent of modern social organization. In capitalist social organization signs are both what is produced and the means of production, especially in late capitalism. For a political economy of signs see Baudrillard's *For a Critique of the Political Economy of the Sign*. This paper draws on the work of Baudrillard and contemporary French social theory, but makes no attempt to be a faithful representation of any single author or style.

2. The number of nurses licensed in Hawai'i is derived from the Board of Nursing, the licensing agency. The number is from 1989 license renewals. The number of nurses estimated to be working in Hawaii is from a 1987 survey of health care agencies in Hawaii by the Hawaii Task Force on Nursing Education and Service. We recognize the problem of comparing 1989 license renewals and 1987 survey data but only enter the comparison to make a rough indication of the gap between the number licensed and those working in nursing.

3. Mention should be made of the large number of Filipino nurses who fail to qualify for Hawaii licensure by reason of low scores in the State R.N. licensure examination. Many are working as L.P.N.s or as nursing assistants.

4. The idea of an unsolved social problem in the context of the nursing shortage was suggested by Deane Neubauer.

5. We are aware that sounds like simple functionalism, a position we hope to elude.

6. This information was gathered in field work in Hawaii. The identity of the sources must be protected.

7. We are thankful to an unidentified member of the audience at the Hawaii Sociological Association meeting on March 24, 1990 for this observation. This observation is confirmed by nursing personnel officers at major Hawaii health care institutions. This ideological belief about young nurses contrasts markedly to the actual age structure of working nurses and probably points to the culture of gender bias more than to the empirical distribution of nurses.

8. Some in nursing report that nursing administrators actually desire high turnover of nurses after a few years of employment.

9. Recently we discovered a feminist series of papers in *Images of Nurses: Perspectives from History, Art, and Literature*, edited by Anne Hudson Jones (1988).

10. See Baudrillard's discussion of gift and sumptuary cultures in *The Mirror of Production* (1975) and Ferrarotti's, *The End of Conversation* (1988), use of non-European cultures to get an idea of non-proletarianized social orders. For a criticism of fetishization of non-European cultures see Kellner's *Jean Baudrillard* (1989).

11. We are thankful to Pat McKnight for materials on graduate training in nursing.

12. There is a process of ever and ever tightening control over health care by the rationalities of financial management. The Peat Marwick acuity system is the latest phase in Max Weber's tightening cage of rationality.

13. Including the socialist countries.

14. Men are subject to the same phenomenon.

15. Those of us who read *The New York Times*, *Nation*, *The New Republic*, *The Wall Street Journal*, and *The New Review of Books* think we are better informed than those who do not read these publications and we feel this knowledge gives us the power to make decisions on behalf of the "uninformed."

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6 Hospitals and Social Control During Hawaii's Kingdom Era Legacies: A Brief History

JEFFREY J. KAMAKAHI

INTRODUCTION

There has been little discussion of the hospitals established during Hawaii's Kingdom era. This, no doubt, is partly due to the paucity of data concerning these health institutions coupled with the difficulty in handling this tumultutous period of Hawaiian history.

The studies that have been done dealing with kingdom hospitals have been quite interesting and varied. This literature may be said to fall into the following categories: inventories of hospital facilities (Bolles, 1947; Nebelung and Schmitt, 1948; Weinerman, 1952); histories of single institutions or unique institutional events (Greer, 1969; Yardley and Rogers, 1984; Talmadge, 1989; Kamakahi, 1989c); general chronologies (Blaisdell, 1983; Kamakahi, 1989a,c); or brief accounts of hospitals as they relate to medical biographies (Halford, 1959).

The purpose of this paper is to present a discussion of kingdom hospitals from a social control perspective. Specifically, the question that will be addressed is: were there differences in terms of social control between Hawaii's kingdom hospitals? In order to accomplish this task, a number of related issues will have to be handled. How did hospitals fit into the fabric of Kingdom history? What is meant by social control? What information is available concerning Kingdom hospitals? How can the data be employed within a single analysis?

BACKGROUND OF HAWAII'S KINGDOM HOSPITALS

Hospitals both reflected and helped instigate the changes that took place during 19th century Hawaii. Therefore, before speaking to the issue of hospitals and social control, it would be appropriate to include a brief history of hospitals during Hawaii's kingdom era.

The Kingdom of Hawaii came into existence when Kamehameha I was successful in establishing a political alliance between what had previously been separate island provinces (Kuykendall, 1938). It was during the turn of the 19th century when foreigners, who were arriving by ships, were beginning to make an impact on Hawaiian history. This contact fostered the transmission of

diseases from the outside world to the Native Hawaiian population. Within a brief period of time, imported diseases were wreaking havoc on the Native Hawaiian population (Schmitt, 1977; Stannard, 1989; Handy and Pukui, 1972). This "invasion" of foreign microbes resulted in cultural genocide: i.e., a situation in which the cluster of intergenerationally transmitted survival practices became insufficient in bringing about the satisfactory outcomes (see Sartre, 1968; Handy and Pukui, 1972). The initial government response to this situation was the development of quarantine practices at the ports, beginning with a proclamation at Honolulu in 1836 and major quarantine laws passed in 1839 and 1842.

Ironically, though the Native Hawaiian population had been reduced dramatically by the Western diseases, the first hospitals in the islands were created by and for foreigners (Nebelung and Schmitt, 1948; Schmitt, 1949; Blaisdell, 1983). The British, the French, and the Americans all established hospitals for their marines as part of their respective programs to dominate the Pacific region (see Doyal, 1979). The so-called "Seamen's Hospitals" were built near the major ports of Hawaii (i.e., Hilo, Lahaina, and Honolulu) where the roads of commerce were being paved. The mission of these facilities was quite specific: they offered palliative care to reticent mariners (Schmitt, 1949).

The first hospital of note to serve non-mariners personnel was opened in 1853. City Hospital was a proprietary enterprise that offered medical care on a fee-for-service basis. Although located within the heart of populous Honolulu, the fee-for-service criterion virtually eliminated the vast majority of Native Hawaiians from availing themselves to the facility. This was because a money economy had not yet been operating extensively throughout the population. In essence, limiting care on a fee-for-service basis was paramount to saying that the facility was designed to care for foreigners and Native Hawaiians of substantial means (see Kamakahi, 1989b).

The State began concerted involvement in the hospital sector with its sponsorship of Queen's Hospital. The fledgling constitutional monarchy enacted legislation to create and maintain quasi-public hospitals on all major islands. The Queen's Hospital, however, was the only institution to achieve actual existence. Immediately it became the center of Western medical care in the islands, serving as an ideological foci for various island factions (see Kamakahi, 1989c). What was unique about Queen's Hospital was that it was designed to serve Native Hawaiians free of charge while others would be cared for on a fee-for-service basis (Kamakahi, 1989c). In essence, the Queen's Hospital of the kingdom era (and even until the early 1900s) was an example of successful socialized medicine.

The influx of foreign contract laborers to man the plantation economy brought a second wave of epidemics to the island archipelago (Schmitt, 1977). *Ma'i Pake*, known more commonly as leprosy, became a major health concern for the kingdom (Gugelyck and Bloombaum, 1979). Quarantine and civilian surveillance of others was intensified, and new laws were put into action as this affliction circulated among the population. In 1865 the State created the Kalihi Settlement Hospital as a receiving station for lepers and designated the isolated peninsula of Kalaupapa as a permanent settlement for those designated as incurable. The Board of Health, which had been established in 1850, was placed in administrative charge of these facilities. After this, generalized concern with controlling the importation and spread of infectious diseases became paramount.

The State continued its efforts to legitimize Western medical practices with the creation of a facility to deal with those diagnosed as mentally ill. The Oahu Insane Asylum was an institution created in the image of those created in the eastern United States (see Rothman, 1971). The Asylum's evolution and management were closely monitored (Talmadge, 1989).

Various other non-governmental specialty hospitals were created during the 1880s and 1890s: the Kingdom's waning years. Not much information is available regarding two short-lived, specialty institutions: Brewer's Leprosy Hospital and the Smallpox Hospital. Brewer's existed between 1881 through 1895 apparently as a private venture. The Smallpox Hospital survived for a brief period, 1881 through 1882, during the height of one of the epidemics that visited the islands (Schmitt, 1949). These facilities apparently were viable during periods when their respective foci were volatile and subsequently discontinued service.

Kapiolani Home was one facet of the *Hoola a me Hooulu Lahui* associated with the reign of King David Kalakaua. The *Lahui* was concerned with the dwindling numbers of Native Hawaiians in the Kingdom's population: not only had diseases taken their toll, but the imported contract laborers now constituted a substantial proportion of the whole. The Lahui adopted a number of measures to circumvent this trend, the most notable being the creation of the Kapiolani Home established for the maternity care of Native Hawaiian women (Yardley and Rogers, 1984; Kamakahi, 1989b).

The sugar plantations had became more and more central to Hawaii's political-economy and interaction within the world-system. By the 1880s and 1890s, the plantations were the life-blood of the Kingdom's economy. By the end of the kingdom era, there arose the plantation hospital. This last "type" of hospital was nested within the plantation corporation, becoming an ancillary service of the larger conceptual rubric. In essence, these were the only facilities

of Western medicine available in the isolated, rural communities of the (non-citizen) contract laborers (see Takaki, 1983; Char, 1975). Later many of these facilities would be adopted by the State in their rural infrastructure building periods.

In 1893 a group calling themselves the Committee of Public Safety (with the illegal complicity of U.S. Marines), overthrew the government of Queen Liliuokalani. This brought an end to the Kingdom period which had begun roughly a century earlier under Kamehameha I (Blount, 1893; Kuykendall, 1967). During the Kingdom era Hawaii had changed from an isolated collectivity of islands into a Westernized country within the world-system. The transformations which occurred were both instigated and reflected in the kingdom's hospital sector.

THE HOSPITAL AND SOCIAL CONTROL

The concept of social control has been one of the core ideas in the field of sociology (Cohen and Scull, 1983; Gibbs, 1989). Although the notion of social control has been applied most conspicuously to the study of deviance and the concomitant levying of sanctions (see Goffman, 1961; Zola, 1972; Parsons, 1951), it has also been used to refer to a broader notion involving the manner in which practices of social control agents is "maintained" by social networks (Foucault, 1973). In this presentation, the duality of the concept of social control will be preserved. On the one hand, certain aspects of the social organization of hospitals allow them to sanction their "clientele": social control within hospitals. On the other hand, hospitals themselves are subject to sanctions by external bodies such as legal agencies, private corporations, community groups, and so on: social control of hospitals.

It is important to preserve this duality in the concept of social control if an understanding of Kingdom hospitals is to be successful. For only then can we link the practices of these health institutions to macro and micro processes.

Social Control Within Hospitals

The notion that health institutions are agents of social control has been forwarded by a number of social scientists (Foucault, 1973; Goffman, 1961; Strauss, 1985; Parsons, 1951). From this perspective, health facilities are hierarchical networks which dispense sanctions: restrictions on the activities of members and clientele, restrictions on contact beyond institutional boundaries, monitoring of care and attention, and the like. Clients are immersed into an environment structured by institutional efficiency rather than the care of the client *per se*.

Foucault (1973) theorized that the clinic was a manifestation of a particular mode of discourse, that discourse being the conception of the body as an object of interventionist analysis (see Turner, 1987). The so-called "clinical gaze" as a legitimized view of health practitioners served to buttress and propagate interventionist measures on those diagnosed as ill. This clinical view of the body worked in consonance with the practices of social control of the ill by health personnel.

Goffman's (1961) idea of the "total institution" was of seminal importance in reference to the realization that health institutions were agents of social control. Goffman begins by illustrating the ramifications of clinical discourse and practices upon the personal lives of patients within mental institutions. It is important to note that Goffman furthers Foucault's position by demonstrating the importance of recognizing the distinction between health practitioners and staff from inmates. Thus, it is not just health practitioners *per se* that are involved in this situation but also their interlocutory assistants, they formed an asymmetrical power situation through a complex network of relations.

The distinction between this triad of actors (i.e., health practitioners, staff, and inmates) was developed further by Anselm Strauss (1985). Strauss has shown in his various writings that the interactions at the level of care are complex and asymmetrical. While outcomes are not determinate, Strauss has continually demonstrated that the practices of staff serve to manipulate the dispensing of care as a way of managing patients.

Parsons (1939, 1947, 1951) dealt with the idea of social control within professional bureaucracies in an entirely different light. His focus was upon the problems of administrators in controlling professionals (i.e., those with expertise in technical applications) within an institution: the dual-lines of authority dilemma. In these instances, the notion of a pure meritocracy is violated. Parsons realized that complex organizations, such as hospitals, require people with a range of skills in which certain role occupants possess high status from both internal sanction and external agencies (e.g., professional guilds and associations). The control of administrators over professionals is especially tenuous in the realm of the latter's sphere of expert knowledge. Parsons, then, presented an exposition of the limits of social control when expert knowledge and external networks are involved.

It becomes quite clear that there is conflict inherent in institutions in general and health institutions in particular. This conflict can be manifested in the care of patients. Where else does one submit oneself to bodily examination by strangers, inconvenience oneself to diagnosis, accept the opinions of others in regard to one's well-being, and submit oneself to being treated as an object?

At each juncture, health practitioners are engaging in social control practices. But nowhere is social control more conspicuous and encompassing than in the hospital.

Social Control Within Kingdom Hospitals

The historical transformations that took place during Hawaii's Kingdom period are tremendous. And this complexity is manifest within the sphere of kingdom hospitals. How to handle this complexity when limited data exists is a major challenge.

Little data exists for hospitals that were established prior to 1860. This is mainly because there was no centralized surveillance of them: such agencies were either nonexistent or in their infancy. Furthermore, some hospitals established after 1860 were short-lived. Much of the data that is available outlines only rudimentary aspects of these facilities.

Another difficulty is the diversity which existed between these health institutions. The Seamen's hospitals, for example, were small, mobile, and offered palliative, acute care to a specific clientele by means of contrast physicians. They were monitored only by the consul of the respective nations. The Queen's Hospital, on the other hand, offered treatment to everyone within the kingdom's boundaries and was under constant government and public scrutiny. Kalihi Hospital was a dreaded respite for those suspected of contracting a specific condition: leprosy. Size, clientele, and level of medical sophistication represent a few of the characteristics in which differences were marked.

These circumstances make it difficult to ascertain similar information on all facilities. As a consequence, a way must be found to synthesize the available information in order to provide a comparative assessment of these health institutions. Employing social control as a sensitizing concept does provide us a means of assessing kingdom hospitals within a single rubric.

The question that needs to be asked is: what characteristics of hospitals would necessitate the employment of different levels of social control measures within these facilities? Given the available data, four characteristics are of substantive import.

First, **how non-discretionary was admission to the hospital on the part of the patient?** What is of interest here is whether patients were willingly subjecting themselves to such treatment. In some cases, such as the leprosariums, patients were vehemently attempting to avoid admission. Even

Queen's hospital had to lobby extensively to initially gain legitimacy among the populous even though there were virtually no barriers to entry. It is being assumed here that greater levels of social control exist within organizations in which non-voluntary patients are being serviced.

Second, **how interventionist was the care**? As Foucault (1973) had pointed out, the "clinical gaze" required a re-orientation of the view of the body. Such an orientation served to legitimize an interventionist model of care: where diagnosis was specific, treatment was intrusive and medical discourse was privileged. Interventionist practices usurp some control from the patient and place wider discretion in the hands of the health practitioners. Such an arrangement translates into the legitimized subjugation of the patient or at least the potential for it.

Third, **from an institutional perspective, how desirable were the patients that were receiving care**? This aspect of social control addresses the latent aspects of care within hospitals. One manner of circumventing the admission of "undesirables" is to restrict entry into the facility by means of seemingly "objective" institutional policies. On the other hand, restriction of admission is also a mechanism for isolating "undesirables" from others. The treatment of low status actors (e.g., contract laborers, the destitute, and so on) is not as desirable, from the facility's standpoint, as the treatment of high status actors in terms of status and management. The assumption here is that those considered undesirable require more resources involving monitoring and surveillance by the staff.

Fourth, and lastly, **how socially isolated was the facility**? Another way of phrasing this is: how independent was the facility with regard to surrounding social groups? The presumption being explicated is that the more socially isolated the institution, the greater its social control capacity. This is because the institution must maintain and employ mechanisms of social control that would otherwise be delegated to other institutions.

These four dimensions of social control within hospitals can be extrapolated from the available data on Hawaii's Kingdom hospitals. Of course, what occurs within the hospital is influenced by its social environment and cultural milieu. Hospitals are also subject to social control by external sources.

Social Control of Hospitals

The political-economic aspects of medical practice are well established in the medical sociological literature (Navarro, 1976; Doyal, 1979; McKinlay, 1984). Kingdom hospitals were not just agents of social control, but were

subjected to social control as well. The influence of surveillance by governmental organs (like the Board of Health), professional organizations (the Hawaii Medical Association), the community (e.g., Hawaiian language newspapers such as *Kuakoa*) helped to parameterize the control of hospital practice.

The manner in which hospitals are controlled by external agencies is varied. Navarro (1976) has demonstrated that the nascent aspects of politics structures the environment within which health institutions exists. This "environment" does exert some influence on the proliferation of certain types of facilities and services (see Robillard and Marsella, 1987).

This political environment includes not only what is directed to hospitals *per se*, but at the health sector as a whole: the legitimacy of professions (Starr, 1982; Friedson, 1970), the form of established medicine (e.g., socialized, fee-for-service, etc.) (Doyal, 1979; Mechanic, 1976), and the level and influence of technology (Brown, 1977; Mechanic, 1977).

In what ways are hospitals controlled from without? There are various mechanisms. Legislation can be enacted delimiting the parameters of medical practice, communities can demand the omission or inclusion of certain practices, guilds may outline the duties and privileges of professions, and so on.

Social Control of Kingdom Hospitals

The history of Kingdom hospitals is indicative of the marked changes that transpired during 19th century Hawaii. Prior to the establishment of the government's infrastructure, hospitals operated according to the discretion of their physician/managers. Thereafter, periods of very close scrutiny occurred, especially conspicuous in times of epidemics. A few facts concerning kingdom hospitals must be remembered.

First of all, the conception of what constituted a hospital changed over time. This prompted Kamakahi (1989a) to adopt a nominalist view of the term. Kamakahi argued that a nominalist perspective offered the advantage of employing the relevant *verstehen* of the period rather than imposing an historically static definition. After all, it must be acknowledged that longitudinal inventories of hospitals employ this perspective.

Second, the creation of hospitals for the kingdom population was a part of the general movement toward infrastructure building which became manifest in the 1850s. At this time, the government had solidified to such an extent that it could concern itself with the addressing of health problems in an active

fashion. This movement involved the creation of specific institutions to monitor, evaluate and intervene with respect to identified issues/exigencies.

Third, the medical profession itself had enjoyed high status at the beginning of the kingdom era. This status manifested itself in the form of political clout rather than in medical feats. By the 1860s, however, physicians themselves were wielding powerful political influence as both political figures of stature and as able lobbyists for their profession.

Once the medical profession had become sufficiently legitimated by the State, the health sector became quite complicated. Much of what transpired thereafter was a melange of conflicts of interests between the State, the medical profession, the royal families, the plantation owners, and the various health problems facing the kingdom's population.

Given the information that is available, some aspects relating to the social control of kingdom hospitals can be gleaned. Although there may be some overlapping of these dimensions, it is believed that they are conceptually distinct.

First, **to what extent was the social isolation of the facility enforced?** Surveillance and enforcement was quite varied among kingdom hospitals. The isolation of the facilities housing those with highly infectious diseases, like leprosy, is one extreme of this dimension where isolation was vehemently enforced. Also, the separation of contract laborers on the plantations was conspicuously policed especially after the passage of the Master's and Servant's Act. On the other extreme, Queen's Hospital served the population at large and often did so on an outpatient basis: in essence, it was integrated into the population at large.

Second, **to what extent was the facility nested within multiple levels of surveillance?** This dimension assesses the degree to which the hospital was answerable to different, hierarchically arranged external agencies. The seamen's hospitals were under very loose and distant monitoring, to the point that there was bribery of at least one consul for the contract. Kalaupapa hospital, however was closely watched by the Board of Health, the legislature, the medical profession, and the community at large. Generally, the assumption employed here is that the greater the levels of manifest surveillance, the greater the social control of hospitals.

Third, **under what types of payment arrangements did the facilities operate?** In other words, how were facilities reimbursed for services rendered? Proprietary hospitals were run on a fee-for-service basis; State facilities were operated via the tax base; and plantation hospitals were paid within the

corporation itself. The working assumption of this paper is that closed systems (such as State and plantation hospitals) were subjected to more social control than open systems (i.e., proprietary hospitals) are subjected to.

Fourth, **how extensively surveillant was the political-economic climate?** As mentioned earlier, there was no substantial regulative governmental bodies for hospitals prior to the 1860s. And it was not until such time that sufficient headway had been made by the kingdom to actively control the spread of diseases in an organized fashion. Even within the latter period, there were fluctuations in organized political monitoring of hospitals. This dimension taps the general "elan" of the period and types of facilities with regard to their social control.

The Duality of Social Control

In this paper, a duality in the concept of social control is being employed. In essence, this duality recognizes that agents of social control do not exist within vacuums. Agents are subjects of social control as well. As independent and important aspects of social control, it is suggested that kingdom hospitals can be located within the cross-section of these dimensions.

METHODOLOGY

Two dimensions of social control as they relate to kingdom hospitals have been discussed: social control within kingdom hospitals and social control of kingdom hospitals. In this section, the sources of the data used to investigate these two notions will be discussed and coding procedures will be explained.

Data

A variety of informational sources were employed for this analysis. Data on hospital name, type (general, specialty), ownership (government, independent, plantation), and area were garnered from Nebelung and Schmitt (1948). Nebelung and Schmitt's survey of facilities is still the most extensive that covers the kingdom period.

Other information required specific sources for different facilities: Seamen's hospitals and City Hospital (Schmitt, 1949); Queen's Hospital (Greer, 1969; Kamakahi, 1989c); Oahu Insane Asylum (Talmadge, 1989); Kalihi and Kalaupapa Hospitals (Gugelyck and Bloombaum; 1979); and plantation hospitals (Weinerman, 1952).

General information regarding Hawaiian history and political economy were also used to round-out the assessments. Works such as those by Kuykendall (1938; 1953; 1967), Daws (1974), and Beechert (1985) were used.

Coding of Data

The data obtained for this study was mostly of the narrative and descriptive variety. While these sources were rich in description, information was not always available in the same fidelity and completeness for all kingdom hospitals. The data that was available had to be assessed with regard to the various aspects of social control.

It was decided that values would be assigned to each aspect of the two social control dimensions. These assigned values were dichotomous: scored one ("1") for extensive presence of that facet in reference to that facility or zero ("0") for non-extensive presence of that facet. The values were assigned employing assessments of all the information that was available. Hospitals, then, could score a minimum of zero for each dimension of social control and a maximum of four for each dimension. Scoring on one dimension of social control, however, was independent of scoring on the other dimension. Those with higher scores for each dimension were assessed as exhibiting higher levels of social control.

RESULTS

Data were coded for each of the twenty kingdom hospitals. Scores were calculated separately for social control within hospitals and social control of hospitals.

Table 1 shows the ranking of kingdom hospitals for social control within hospitals with the name of the facility and their scores respectively.

As can be seen by an inspection of Table 1, the hospitals fall into certain clusters. The State and private hospitals controlling infectious diseases and mental illness, two of the most stigmatized categories of afflictions, were rated high in social control within hospitals; and plantation hospitals, which served another stigmatized population - contract laborers, were also in this cluster. Those situated low in social control within hospitals were the proprietary facilities and the seaman's hospitals.

Table 1 Ranking of Social Control Within Kingdom Hospitals.

Rank	Hospital	Score
1	Kalaupapa Hospital	4
	Kalihi Hospital	4
2	Oahu Insane Asylum	3
	Brewer's Leprosy Hospital	3
	Smallpox Hospital	3
	Ewa Plantation Hospital	3
	Hamakua Plantation Hospital	3
	Hawaii Sugar Plantation Hospital	3
	Kilauea Plantation Hospital	3
	Kealia Plantation Hospital	3
	Koloa Plantation Hospital	3
3	Malulani Hospital	2
4	City Hospital	1
	Queen's Hospital	1
	Kapiolani Home	1
5	U.S. Marine Hospital (Honolulu)	0
	British Marine Hospital (Honolulu)	0
	French Marine Hospital (Honolulu)	0
	Marine Hospital (Hilo)	0
	Marine Hospital (Lahaina)	0

Table 2 lists kingdom hospitals in terms social control of hospitals along with facility name and their respective scores. The same kind of division that existed in Table 1 is manifest in Table 2. There has been, though, some rearrangement in the list. Much of the similarity is due to the clustering of both the plantation and seaman's hospitals respectively.

Figure 1 graphically displays kingdom hospitals within an intersection of the two dimensions of social control discussed in this paper. On the vertical axis is the dimension of social control within hospitals by score (i.e., 0 - 4). The horizontal axis displays the scores for the social control of hospital dimension (i.e., 0 - 4). Higher values for both dimensions indicate a higher level of social control.

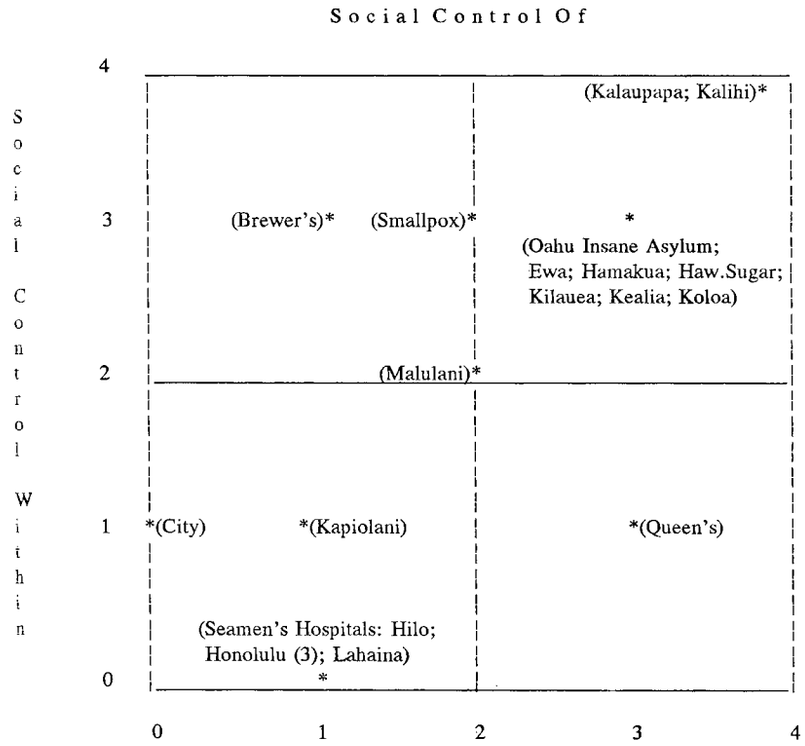
Table 2 Ranking by Social Control of Hospitals.

Rank	Hospital	Score
1	Kalaupapa Hospital	4
	Kalihi Hospital	4
2	Queen's Hospital	3
	Oahu Insane Asylum	3
	Ewa Plantation Hospital	3
	Hamakua Plantation Hospital	3
	Hawaii Sugar Plantation Hospital	3
	Kilauea Plantation Hospital	3
	Kealia Plantation Hospital	3
	Koloa Plantation Hospital	3
3	Smallpox Hospital	2
	Malulani Hospital	2
4	U.S. Marine Hospital (Honolulu)	1
	British Marine Hospital (Honolulu)	1
	French Marine Hospital (Honolulu)	1
	Marine Hospital (Hilo)	1
	Marine Hospital (Lahaina)	1
	Brewer's Leprosy Hospital	1
	Kapiolani Home	1
5	City Hospital	0

Although this "sample" is too small for meaningful statistical analysis, there does seem to be a general association between both dimensions of social control. It seems to be the case that both dimensions of social control vary in the same direction: that is, high social control of hospitals is associated with high social control within hospitals and vice versa. This association is quite marked because of the clustering together of many like-situated institutions: namely, the plantation and seamen's hospitals.

Even with this trend, the graphical depiction of these facilities in Figure 1 illustrates the diversity even in this small number of hospitals. And it provides a way in which such a heterogeneous array of institutions can be handled on conceptually equal footing.

Figure 1 Kingdom hospitals by social control within and of Dimensions.



We should be cautioned upon extrapolating too far beyond this analysis. It must be remembered that this is an analytical framework placed upon health institutions existing within very diverse circumstances. Unlike historically inclined analyses in which the milieu is integral in the analysis, here the milieu is selectively incorporated into pre-selected dimensions. Thus, some information is ignored for sake of focused inquiry.

DISCUSSION

The duality in the concept of social control has been preserved in this presention. In this way two separate but complementary traditions employing the notion of social control have been incorporated: that concerning the

institution as an agent of social control (Within) and that considering the institutions as subjects of social control (Of).

Because the comparative data on hospitals for the kingdom period were sparse, information was supplemented by other relevant literature. Also, the focus of this paper meant that information was incorporated selectively and were sometimes organized in terms of various working assumptions when being coded.

There is always the danger that the use of such working assumptions may have influenced the data rather than vice versa. This might account for some of the homogeneity displayed within plantation and seamen's hospitals. Granted, these assumptions do focus upon certain types of information and interpret them in prescribed ways, but by the same token certain hospitals shared characteristics because they existed within similar milieu. But, there does not seem to be an association between the social control assessment of hospitals and the year within which the hospital was established as would be suggested if one focused exclusively upon the government infrastructure and political-economic aspects.

Being an analytical framework, this study does not claim to be more than a way of interpreting certain information from a perspective of social control. Obviously, there is room for improvement.

First of all, we could hope that more complete and comparable data were available for kingdom hospitals. For some of these facilities, this may be plausible, especially those facilities established during or after the 1860s when the surveillant government structures were operative. This analysis included those kingdom hospitals existing previous to this time with the most complete data publically available.

Secondly, the working assumptions used in this analysis may be treated as research propositions or hypotheses in their own right. Since the coded data were textured by the assumptions employed, different results may be yielded by their modification. The working assumptions were employed in this study to establish comparability between hospitals.

Thirdly, only a few aspects of social control were explicated. If different dimensions of social control were used or different aspects of the two dimensions explicated, the results might be modified. After all, what we find is dependent on what we look at, both what is included and what is omitted are of fundamental import. In this study, the exposition of social control dimensions was an attempt to match this concept with available data.

Finally, it must be admitted that such a "timeless" analytical framework handles history by ignoring it somewhat. Each hospital was treated as an ephemeral unit extracted from its milieu. Although certain contextual aspects of facilities were incorporated into the dimensions themselves, history is lost. The "background" section was included specifically to give the reader a glimpse of how these facilities fit into the history of the Hawaiian Kingdom.

CONCLUSION

What utility does this analytical framework have in regard to the study of social control regarding Kingdom hospitals?

First, it sensitizes us to the existence of mechanisms of social control within health institutions in general and kingdom hospitals in particular. Hospitals were not always legitimized, voluntarily sought after, and universalistic enterprises. Instead, many were places to separate and isolate certain groups from others.

Second, it demonstrates the heterogeneity that existed between kingdom hospitals. In this vein, such a scheme facilitates the inquiry into various tendencies and anomalies in regard to social control mechanisms and processes.

Third, it offered a means by which diverse institutions existing during different contexts can be compared within a single analysis. In this case, similarities and differences were graphically depicted.

Future research involving Hawaii's kingdom hospitals will hopefully be facilitated by this analysis. Some directions that might be followed include: incorporating hospitals after the Kingdom era into the scheme; including non-health institutions in the analysis for the 19th century; or refining the analysis of certain clusters of facilities, most notably, the plantation and seamen's hospitals.

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7 Ethnic Juries in Hawaii: 1825-1900[1]

PETER J. NELLIGAN AND HARRY V. BALL

INTRODUCTION

One of the critical issues that every social group must address concerns the mode by which disputes are to be processed and by which formal social control is to be exercised upon its members. If at least minimal stability is to be achieved, a social group must contain conflict and provide for the exercise of authority over its members. All authority systems attempt to endow these functions with legitimacy -- the feeling on the part of the group members that they ought to comply with authoritative decisions because of their source or the process by which they were reached (Weber, 1954:3-5).

One major institution that has developed in Western society to give authoritative decisions is the jury. This institution, developed in England as a constraint on arbitrary centralized power, and passed on to countries adopting the English legal model, promotes legitimacy by delegating legal decision-making power to a body of the peers of the disputants or the accused. Such a body is thought to be able to issue a reliable judgment likely to be accepted by the community.

However, through time the issues of when to use a jury, what role the jury should play and who are the "peers" have been major political questions (Green, 1985; Thompson, 1986; Langum, 1987). As Van Dyke (1977:7-19) observes, problems arise with jury legitimacy when a social group is characterized by class, ethnic, political, or other serious social divisions. In these situations the determination of a jury of "peers" is problematic and definitions of what a peer is have varied. Van Dyke (1977:10-11) notes that the Magna Charta provided that English knights were to be tried by juries of other knights. Juries of cooks have been assembled to try persons accused of selling bad food. Until recently in England, merchants were impanelled to try commercial cases. In thirteenth century England equal numbers of Christians and Jews sat on disputes between members of the two religions. In Plymouth Colony, colonists sat with "Indians" on cases of crime or other dispute between colonists and the natives. Until the nineteenth century, mixed juries of aliens and citizens sat on criminal cases involving aliens in both England and America. While we have been unable as yet to trace any direct connection to Hawaii, we should note that Cesare Beccaria, the founder of the classical school of criminology, first published *An Essay on Crimes and Punishments* in Italian in 1764 and it quickly became widely available in both French and English editions. He wrote (Beccaria, 1819: 54-55):

> It is an admirable law which ordains that every man shall be tried by his peers; for, when life, liberty and fortune, are in question, the sentiments which a difference in rank and fortune inspires should be silent; that superiority with which the fortunate look upon the unfortunate, and that envy with which the inferior regard their superiors, should have no influence. But when the crime is an offense against a fellow-subject, one half of the judges should be peers of the accused, and the other peers to the person offended: so that all private interest, which, in spite of ourselves, modifies the appearance of objects, even in the eyes of the most equitable, is counteracted, and nothing remains to turn aside the direction of truth and the laws....

In contemporary America the general rule is that one's peers are all citizens of adult status (Van Dyke, 1977:9). However, demands have arisen in some quarters to change certain practices to assure that juries do not exclude members from the particular social groupings of those involved in a case. These demands arose in part because of the widespread practice of prosecutors to use their peremptory challenges to exclude from a jury all persons of the same ethnicity as the defendant in criminal cases, but the inviolability of a prosecutor's right to use his peremptory challenges in an unrestricted manner appeared to have been settled by the United States Supreme Court in *Swain v. Alabama* (380 U. S. 202) in 1965.

However, in 1986 the Supreme Court of the United States in *Batson v. Kentucky* (476 U. S. 79) returned to the problem of "racial" exclusion from juries or "racial" inclusion on juries and did restrict the right of prosecutors to use peremptory challenges to exclude all persons of a defendant's ethnicity from a criminal trial jury. In 1990 the Supreme Court of Hawaii extended this restriction to gender (*State v. Levinson and Carvalho, Respondents*, 71 Haw. 492, 795 P. 2d 845), and in 1991 the U. S. Supreme Court extended its restriction on racial exclusion to civil cases also (*Edmundson v. Leesville Concrete Co.*, 500 U.S. __, 114 L. Ed. 2d 660). Recent years have also witnessed many Native American Indian tribes gain the right to try offenders in tribal courts with Indian juries.

These events have created new interest in the ethnic jury system of 19th century Hawaii. Hawaii in the nineteenth century clearly represented a problematic situation and jury questions became a focus of intergroup conflict. Indeed, representatives of foreign governments and other resident foreigners intentionally used the jury issue to create conflict for the purpose of pursuing their own national and personal interests.

This article is a work in historical sociology. Following Peter Manicas (1981), we believe that the job of historical sociologists is to explain the development of social institutions, that is, their creation, modification and extinction, and to set forth the critical events which account for these developments.

In this article we will briefly describe the indigenous Hawaiian authority structure and its decision making processes and then describe the major events associated with the development of the institution of European and American type juries with special ethnic characteristics. Considerable attention is paid to the "consul jury," whose members were nominated by foreign consuls, because it was the most prominent real and symbolic jury issue. Although this institution was used in only a handful of cases, it was a serious symbolic encroachment on the Kingdom's sovereignty and remained a constant irritant to the Hawaiian government until it was eliminated.

THE INDIGENOUS AUTHORITY STRUCTURE

A complete treatment of social control and legal decision-making in Hawaii before the arrival of Westerners is beyond the scope of this paper, but some of the principal elements of Hawaiian social organization must be described. These generally pertain to the high level of stratification that existed, the religious-cosmological system, and the nature of the economy (Barratt, 1987; Tyerman and Bennett, 1832; Campbell, 1967; Cox, 1957; Earle, 1978; Franchere, 1969; Frear, 1894; Goldman, 1970; Holt, 1979; Hommond, 1976; Ii, 1963; Kamakau, 1961; Loomis, 1820-1823; Malo, 1951; Pukui, *et al*, 1972; Ross, 1849; Sahlins, 1958, 1981, 1985; Valeri, 1985; Vancouver, 1798).

With respect to stratification, the principal division was between the chiefs (*ali'i*) and the commoners (*maka'ainana*, attendants of the land). The *ali'i* were in turn ranked according to genealogical proximity to the gods and achievement. Power and authority devolved downward from the highest *ali'i*, the *ali'i nui* or king, to the lowest, with each rank having considerable power over those below. The commoners as a group were controlled by the *ali'i*.

This social control was expressed in both the land tenure system and the religious-cosmological system, commonly called the "kapu system." Authority over land use resided with the king. He divided the land and delegated authority over it to his immediate subordinates, who did likewise, until actual occupation for productive use devolved upon the commoners. Surplus product in the form of ritualized tribute was passed back up the hierarchy. Bad behavior or lack of productivity could result in removal from one's land or position of authority.

The *kapu* system was a complex, religiously based set of prescriptions and proscriptions that defined the relationships of the commoners to the *ali'i* and the *ali'i* among themselves. It also included specific rules of behavior established by the chiefs applying to such matters as the conservation of fish or the use of water (*kanawai*). Violation of a *kapu* could result in immediate punishment, even death, at the hands of a chief or priest (*kahuna*).

The nature of the Hawaiian economy, the fact that the commoners, the great mass of the people, did not or were not allowed to accumulate great surplus value in the form of property greatly reduced potential for interpersonal conflict and disputes. There was little for them to fight over and disputes over such things as water use would be settled by the chiefs' managers (*konohiki*).

THE PRINCIPLES OF THE INDIGENOUS JUSTICE SYSTEM

If we think of a jury system as consisting of at least two separated roles, that of a judge to conduct the trial and a body of jurors to render a verdict in the case, there was no formal jury system in Hawaii when Captain Cook arrived in 1778.

At a risk of great oversimplification, there appear to have been several principles operative in authoritative responses to violations of rules (*kapu, kanawai* or chiefs' orders) or to other disputes between Hawaiian individuals into the 1830's. First, there tended to be (1) summary justice if superordinate-subordinate relations were involved and (2) more compensatory or conciliatory processes if the parties were roughly equal in the social and political hierarchy. Second, collective decision-making and sanctioning were often imbedded both in practices which sought to restore harmony (*ho'oponopono*) and practices which imposed punishments. This last was related to the third principle, that of collective responsibility. Fourth, certain persons of high rank had the power to pardon offenders (*pu'uhonua*) either in person or by designating places where a violator could not be harmed until relations with the offended could be restored.

In general the chiefs did not concern themselves with interpersonal wrongs among the commoners, unless the conflict reached such proportions that it disturbed the community. In most cases the burden fell on the victim and his or her kin group to move against the wrongdoer. Immediate retaliation was likely if the offender was caught in the act. In other cases, particularly if the wrongdoer was able to make his way to a person or place of refuge, a process of mediation between the kin groups, resulting in compensation or restitution to the victim, could be used to restore the social fabric. Success in righting personal wrongs was always dependent on the relative statuses of the victim and

the wrongdoer and the ability of the victim to mobilize community sentiment in his or her behalf. In some cases trial by ordeal was employed. Suspected offenders could be given the "test of the shaking water" to determine truthfulness. Where the wrongdoer was unknown, he could be encouraged to come forth by the threat of being "prayed to death" (*ana'ana*) by a priest, acting on behalf of the victim.

FIRST FOREIGNERS (*HAOLE*) AND THE JUSTICE SYSTEM

The first handful of foreigners (*haole*) who were forced or given permission by a high chief to reside in Hawaii were perceived by the chiefs to be subservient to them, that is, they were designated as "belonging to a chief." In return for rendering service as interpreters, skilled workers, or soldiers skilled in the use of guns and cannons, they were allotted land and the services of the commoners on the land. If they offended their chief they could lose land holdings, be banished, or even be assassinated. As transient or seasonal ships arrived more often, the captains of the ships were expected to maintain discipline and to punish their seamen if altercations broke out involving only foreigners. On the other hand, if the altercation involved a foreigner and a native, King Kamehameha I did not hesitate to assert his judicial jurisdiction. Three such cases in 1811 and 1812 have been documented (Franchere, 1969:67-8; Marin, 1973:202; Cox, 1957:8).

THE ABOLITION OF THE KAPU

This situation began to change in 1819 with the death of Kamehameha I, the designation of one of his Queens, Kaahumanu, as the *Kuhina Nui* (co-authority with the King) and the ascension of Kamehameha II (Liholiho) to the kingship. These events were followed shortly by the "abolition of the Kapu," with the attendant reduction of the enforcement roles of the priests and the destruction of the temples and the images of the gods, and a much greater dispersal of authority among the high chiefs (Davenport, 1969).

THE "RESIDENCE RIGHTS" OF FOREIGNERS NOT "BELONGING TO A CHIEF"

The pace of change was increased beginning in 1820 by intensification of the sandalwood trade and the arrivals of American missionaries and the first whalers basing in Honolulu to hunt off the coasts of Japan (Bradley, 1942). These events increased the number of resident foreigners and seasonal seamen, and there was a corresponding increase in public disorders in Honolulu, especially among foreigners. In September, 1820, the King ordered all foreigners that "had not lands" to leave the islands (Marin, 1974:270). The

order was brought from the island of Hawaii by John Rives, a French Catholic then serving as a clerk of the King. Governor Boki assembled all the foreigners in Honolulu and announced the order. Hiram Bingham, the leader of the mission, argued with Rives that the missionaries did not "belong to any Chief," but that as American citizens they were entitled to remain in the islands under the protection of both the United States and the "civil power of Hawaii" so long as they were "conforming to the laws of the country" (Bingham, 1847:112-113). This was the beginning of many disputes concerning the rights of the government of Hawaii to control immigration to the islands and to establish jurisdiction over the foreigners.

In March 1822 the King and his Chiefs in Council, immediately following a riot involving the crews of two foreign ships, published the first printed law in Hawaii, an enactment prohibiting riotous disturbances by foreigners and placing such offenders within the jurisdiction of the governors' summary courts (Kuykendall, 1926:129).

THE ADVICE OF LORD BYRON

The next major development was the arrival of Lord Byron in June 1825 with the bodies of King Liholiho and Queen Kamamalu, who had died in London. Among other things he advised new King Kamehameha III (Kauikeaouli) and his Chiefs in Council that "no man's life shall be forfeited but by the consent of the King in Council with twelve Chiefs or the Regent [Kaahumanu] in time being for the King," still reserving to the King the right to pardon (Bingham, 1847:270). Although this advice applied only to capital punishment, it did apply to all persons, chief or commoner, Hawaiian or foreigner.

A CHALLENGE TO THE GOVERNOR'S JURISDICTION OVER FOREIGNERS

Almost at this same time Poalinui, the Hawaiian wife of Joseph Navarro, a Honolulu hotel keeper, deserted her husband in favor of Captain Sistaire, a rather renegade whaler. Navarro retaliated by shooting and wounding Sistaire, and both Navarro and Sistaire were brought before Kalanimoku, the *Kalaimoku* (Prime Minister) for trial. Kalanimoku now shared his task and invited the foreign residents to help decide the case. Some of the foreigners denied Kalanimoku's jurisdiction over a case involving only foreigners, but Kalanimoku replied that if such were the case he would just let the "crews and the mates fight it out" in the future. The foreigners then conceded that he should enforce the law of 1822 and in August 1825 both Navarro and Sistaire were ordered

banished from the Kingdom (E. Loomis, Aug. 22 & 24, 1845; Chamberlain, Aug. 22 & 24, 1825).

THE FIRST IMPLEMENTATION OF BYRON'S ADVICE

A year later in September, 1826, a homicide case occurred which appears to represent the initial implementation of Lord Byron's advice. Two Hawaiians, Kamakea and Kamumuku, robbed and killed a Spanish laborer of longtime resident Don Francisco de Paula Marin. Kamakea was probably drunk at the time of the incident, to which there were many witnesses. Governor Boki and Kalanimoku conducted an investigation. British Consul Richard Charlton demanded that they be hung immediately. Governor Boki agreed, but Kalanimoku refused to permit their execution until the chiefs of all the principal islands had met, considered the matter and given their approbation. Kamumuku escaped the Fort and was subsequently pardoned. Kamakea refused to escape and was hung, after it was widely proclaimed by Kalanimoku and the King that this was the fate of those who "break the laws of God" (E. Loomis, Sept. 17, 1826; Kamakau, 1961:278).

THE UNITED STATES MADE A "MOST FAVORED NATION"

Shortly thereafter (December 23, 1826) the Hawaiian rulers and U. S. Navy Captain Thomas ap Catesby Jones, who had come to Hawaii to negotiate the payment of the debts which the Chiefs had amassed to American traders in the course of the sandalwood trade, signed certain "Articles of Agreement." Included was a provision that American citizens in Hawaii should be protected in their lawful pursuits and be permitted to sue in the Kingdom's courts; others which read in part that "the citizens of the United States [shall be] permitted to trade freely with the people of the Sandwich Islands" and "the citizens or subjects of the Sandwich Islands shall be allowed to trade with the United States, and her territories, upon principles of equal advantage with the most favoured nation." Jones apparently did not believe that he had authority to negotiate a treaty and the articles were never ratified by the U. S. Senate. Nevertheless, the government of the Kingdom would continue to adhere to its terms and U.S. consuls would demand that its "most favored nation" clause be enforced (Stauffer, 1980; Kuykendall, 1938:98-99).

THE PRINTED LAWS OF 1827

On December 8, 1827, the King and his Chiefs in Council had printed a brief set of laws (*He Olelo No Ke Kanawai*) prohibiting certain acts and establishing penalties for them: murder (death by hanging), theft (irons), adultery (irons), selling rum (irons), prostitution (fine) and gambling (irons) (Archives of

Hawaii, hereafter AH). It appears that the first three took effect immediately and the latter three were to take effect after the people had been properly forewarned.

U.S. COMMERCIAL AGENT INSISTS THE GOVERNOR TRY A FOREIGNER FOR ASSAULTING ANOTHER FOREIGNER

Two weeks later John Lawler assaulted Captain Gardner, the master of an American whaler, over a business disagreement. Gardner went to Governor Boki and asked for redress. Boki refused until U.S. Commercial Agent ("consul") John C. Jones insisted that he assert his jurisdiction. Boki relented, tried Lawler and fined him two hundred dollars. A missionary commented that the case was the first in which the governor convened "a court" in a dispute solely involving foreigners (Chamberlain, Dec. 20, 1827), but it is significant that the governor did so only at the insistence of a representative of a foreign government.

THE CASE OF THE SANDALWOOD CUTTER

Two months later in February, 1828, a Hawaiian sandalwood cutter killed another Hawaiian. *Kuhina Nui* Kaahumanu and other chiefs conducted an investigation and sentenced the cutter to death. When the chiefs inquired of the American missionaries about the proper method of hanging, they were advised that the real issue was the procedure for establishing the defendant's guilt. The execution was postponed three weeks, during which time twelve Hawaiians, presumably all chiefs, held a new trial, found the cutter guilty and sentenced him to be hung (Chamberlain, Feb. 27-29 & March 18, 1828).

THE "COW CASE:" LAWS APPLY TO NATIVES AND FOREIGNERS ALIKE

A highly significant dispute took place in October, 1829. It began when a Hawaiian shot a cow belonging to British Consul Charlton which was trespassing in his garden. Charlton and U.S. Commissioner Jones roped the native round the neck and dragged him behind a horse, inflicting serious injuries. Subsequently the King issued "The Cow Case Proclamation," which among other things declared: "If any man shall transgress any ... laws, he is liable to the penalty, the same for every foreigner and for the people of these islands, whoever shall violate these laws shall be punished" (Bingham, 1847:351). In Hawaii the laws of the Kingdom were to apply to all.

TWO GRADES OF HOMICIDE DISTINGUISHED

By 1832 the King and chiefs had begun amending the 1827 laws, although the new laws would not be printed until 1834 (Reynolds, June 19, 1833). Among other changes they now distinguished between "willful killing" and "killing in anger" or "provoked killing" (manslaughter). The consequences were immediate.

THE TRIAL OF HENRY COLEMAN

In November, 1832, Henry Coleman, a half-Hawaiian boy fourteen or fifteen years old, defending against an invasion of his family's residence, struck and killed a drunk foreign sailor, Benjamin Whittier. King Kamehameha III, *Kuhina Nui* Kinau, and Gov. Kuakini investigated the case. Coleman was found guilty of "manslaughter" (provoked killing) and sentenced to banishment to Kaahoolawe for a limited time (Reynolds, Nov. 6, 1832; Bingham, 1847:443). None of the descriptions of this case mention a convening of twelve chiefs, but such would not have been necessary since the adjudicators had convicted Coleman of a non-capital offense.

A MIXED JURY FOR AN ALL FOREIGNER CASE

The next month (December, 1832) Irish seaman Robert F. Bell, stabbed and killed Irish seaman Wilson in a saloon fight. A meeting of the chiefs was held to consider the matter and two days later Bell was tried before a jury composed of twelve foreigners and twelve Hawaiians. He was found guilty of "wilful murder" (Chamberlain, Dec. 3 & 14, 1832; Reynolds, Dec. 2, 3, 11, 13 & 14, 1832). Since neither the offender nor the victim was Hawaiian, it can be surmised that we now find a principle emerging that twelve foreign jurors were necessary to legitimate the conviction of a foreigner for a capital offense, while twelve Hawaiian jurors (presumably chiefs) were needed to concur for the King to consent to the forfeiture of a person's life. Lord Byron had recommended that the King's decision be made "in Council with twelve Chiefs," but with the institution of a jury in capital cases the twelve chiefs had now moved into the courtroom.

AN EXCLUSIVELY HAWAIIAN JURY FOR A HAWAIIAN CASE

Two years later (1834) a Hawaiian man was hung for murdering his Hawaiian wife (Chamberlain, Dec. 30, 1834, & March 18, 1835; Reynolds, March 19, 1835). No mention can be found of a jury in the scant references to this case, but the fact that no foreign residents mentioned it most probably means

that there was only an all Hawaiian jury. Here a single Hawaiian jury could both judge and consent to the execution.

A MIXED JURY FOR A HALF-HAWAIIAN AND FOREIGNER CASE

The next year (September, 1835) another mixed jury of twelve each was employed in a case involving two half-Hawaiian defendants and a foreigner victim. John and Isaac Lewis had been hired by a ship's officer to beat up one of his crewmen. A longtime resident foreigner, Henry Palmer, had attempted to intercede and been struck and killed by John Lewis. Levi Chamberlain wrote,

> I understand that the jury was composed of twelve foreigners & twelve natives - or rather two juries of equal numbers. Both, after hearing the witnesses, agreed in the verdict of Man Slaughter; which crime is by law punishable by four years imprisonment, but may be commuted by paying two hundred dollars in money. (Chamberlain, Sept. 15 & 21, 1835, underline in original; Reynolds Sept. 15, 1835)

THE LORD RUSSELL TREATY AND THE PETIT-THOUARS CONVENTION

In 1836 Lord Edward Russell arrived at Honolulu in H.B.M.S. "Acteon" and involved himself in a number of complaints which British Consul Charlton had made against the Hawaiian government. On November 16 the King agreed to a form of treaty, article one of which read:

> The English subjects shall be permitted to come with their vessels, and property of whatever kind, to the Sandwich Islands; they shall also be permitted to reside therein, so long as they conform to the laws of these Islands, and to build houses, and warehouses for their merchandise, with the consent of the King, and good friendship shall continue between the subjects of both countries.... (*Sandwich Island Gazette*, Nov. 11, 1836; Kuykendall, 1938:148)

Future problems would arise over the interpretation of the phrase "with the consent of the king," with the British insisting that such consent must be given so long as the British subject is law-abiding.

The next year French Captain Du Petit-Thouars and British Captain Edward Belcher arrived in the midst of disputes about the pending expulsion of two Catholic priests, one French and one British, and compensation for the

detention of a ship of British registry, owned by a Frenchman who was a British subject, Jules Dudoit. Petit-Thouars begrudgingly conceded that the King was within his rights to exclude the priests if he so wished. Although he had no authority to make a treaty, Petit-Thouars then proposed and the King accepted a convention on July 24, 1837, with a clause that

> ....the French may go and come freely in all the states which compose the Government of the Sandwich Islands; they will be there received and protected, and they will enjoy the same advantages as the subjects of the most favored nation. (Bingham, 1847:511; Kuykendall, 1938:150)

Petit-Thouars also appointed Dudoit to be provisional French consular agent.

Missionary Bingham, seeking to be consistent with his 1820 position that the King must consent to the residence of persons so long as they conform to the laws of the Kingdom, now led the King and his Chiefs in Council in December 1837 to issue "An Ordinance Rejecting the Catholic Religion" which prohibited its being taught, its ceremonies being exhibited or any vessel bringing a Catholic teacher to the Kingdom (Kuykendall, 1938:151). Such conduct was now clearly a violation of the law. This enactment was followed by an intensification of the prosecution of native Catholics (*Sandwich Island Gazette & Journal of Commerce*, June 29, 1839), which had gone on sporadically since 1827 and which continued until the King ordered its halt on June 17, 1839.

THE FRENCH CONSUL JURY TREATY PROVISION OF 1839

However, by 1838 the government of France had interpreted such actions by the chiefs of Tahiti and Hawaii to be efforts by British and American Protestant missionaries to monopolize the commerce of these islands "under the pretext of a religious quarrel." Accordingly Captain LaPlace of the "Artimise" was ordered to touch on these islands

> ....to rectify the erroneous opinion which has been created as to the power of France [and to] exact, if necessary with all the force that is yours to use, complete reparation for the wrongs which have been committed, and you will not quit those places until you have left in all minds a solid and lasting impression. (Quoted and cited in Kuykendall, 1938:152)

LaPlace arrived at Honolulu in July, 1839, and he and French Consul Jules Dudoit immediately presented King Kamehameha III with a set of demands and a threat to begin hostilities if they were not met. Although it was not

included in the original demands, Article IV of the LaPlace Treaty, signed July 17, 1839, said:

> No Frenchman accused of any crime whatever [*crime ou delict*] shall be judged otherwise than by a jury composed of foreign residents, proposed by the Consul of France and accepted by the government of the Sandwich Islands. (Bingham, 1847:547)

There were at the time at most four hundred American, two hundred British and seven French residents, along with at least 100,000 Hawaiians.

The LaPlace Treaty was the first extension of the right to trial by jury to "any crime whatever," the first requirement that any class of foreigners be tried by a jury exclusively of foreigners even if the victim were a native Hawaiian, and the first requirement that the jury must be selected from a list nominated by a foreign consul.

One might inquire why Dudoit did not also demand that the French Consul be given a clear role in the selection of juries in civil suits involving a Frenchman? The most probable answer is that whenever a foreigner sued a foreigner the case typically went to arbiters. Thus, the month after LaPlace left Honolulu Dudoit sued James J. Jarves for "libel" because of an article he had written in the *Hawaiian Spectator* about LaPlace's visit. The dispute was given to five arbiters, described by one of them as being "a jury" (Reynolds, Aug. 5, 1839).

THE EXTENSION OF CONSUL JURIES TO OTHER NATIONALS

Immediately British Consul Charlton and United States Commercial Agent Peter A. Brinsmade demanded similar rights under the "most favored nations" provisions of their nations' agreements with the Hawaiian government. The King gave verbal assurances of this, but he subsequently refused to put it in writing. Nevertheless, it did become the practice. Thus in March, 1840, Governor Kekuanaoa asked Brinsmade to propose twelve names of foreigners for the trial of Henry, an American, presumably for killing another foreigner. Brinsmade, adopting a more conciliatory posture, submitted twenty-four names in two groups of twelve: "I am telling you of these persons because you asked, but not because I believe that I have any say in matters of trials in your land. And because of your word that I too could interrogate the witnesses" (Brinsmade to Kekuanaoa, March 24, 1840, AH).

A JURY OF CHIEFS TO TRY A CHIEF

Six months later Kamanawa, a close friend of the King, and Lono, a captain of one of the Kingdom's ships, were tried on a charge of poisoning Kamanawa's wife and were convicted by a jury of "twelve of the most intelligent Hawaiians, all of high rank" (*Polynesian*, Oct. 3, 1840; Chamberlain, Sept. 28 & 30, 1840). Much pressure was put on the King by some foreigners, including U. S. Navy Capt. Wilkes of the Exploring Squadron, not to grant a pardon to Kamanawa on the ground that it was a basic test of whether or not the law applied equally to all persons (Morgan, *et al*, 1978:499). The King left Honolulu and went to Maui to avoid Wilkes (Reynolds, Oct. 10, 1840). Kamanawa and Lono were hung.

THE CONSTITUTION OF 1840

The first printed Constitution, adopted November 8, 1840, was silent on the right to trial by jury, although it did address the issue of impartiality:

> No man or chief shall be permitted to sit as judge or act on a jury to try his particular friend [or enemy], or one who is especially connected with him. Whereupon if any man be condemned or acquitted, and it shall afterwards be made to appear, that some one who tried him acted with partiality for the purpose of favoring his friend or injuring his enemy, or for the purpose of enriching himself, then there shall be a new trial allowed before those who are impartial (Kingdom, 1842:1-2).

A FOREIGN JURY FOR A CIVIL SUIT BETWEEN FOREIGNERS

However, a week after the promulgation of the constitution Gov. Kekuanaoa assembled a jury of twelve foreigners, "mostly Men-of-War folk," for a suit between Henry Paty and Capt. Curtis Clapp to establish the ownership of some tallow which Clapp had just brought from San Pedro. After the jury was assembled, the case was taken out of court and settled by three "referees" (Reynolds, Nov. 7, 13, 14 & 16, 1840; Kekuanaoa to Jurymen, FO & Ex Doc. No. 133, AH). This is the first instance found of an actual convening of a jury for a civil trial, and it introduced the principle that a foreign jury should hear cases involving only foreigners.

CONSUL JURIES IN CIVIL TRIALS?

However, the next year British Consul Charlton raised the Consul Jury issue in the context of a civil suit between two foreigners, one of the first such

suits not sent to arbitration. In October, 1841, Henry Skinner, a British subject, brought a suit in the Governor's Court against John Dominis, a U.S. citizen, in a contract and money dispute. Charlton now insisted that under an agreement between Governor Kekuanaoa and himself, reached in consultation with Captain Jenkins Jones of the British warship "Curracoa," he would name six jurors and consider the names of six submitted by the U. S. Consul. Brinsmade refused to accept all of Charlton's list. The Governor then stated that his understanding of the agreement was that he would accept any twelve jurors agreed upon by the two consuls and that in the absence of such agreement he would appoint a jury. Brinsmade submitted twelve names for Charlton to consider, but Charlton insisted upon his right to name his six, subject only to a challenge for cause. The Governor then appointed a jury, which did include every British subject in the room except Charlton and Skinner, and announced that the court was organized. Skinner protested and left; the Governor declared a non-suit.

The next day, October 14, Charlton and Capt. Jones visited the King and the King and Capt. Jones signed an agreement that the King would "summons a jury consisting of equal numbers of Respectable British Subjects, and citizens of the United States, residing on this Island to try the case between Mr. Skinner and Capt. Dominis, but that if such a jury will not meet on my Summons, or if Mr. Skinner & Capt. Dominis will not plead their case before the said jury, I will have nothing more to do with the case" (Copy in Reynolds, March 6, 1843). Brinsmade protested, insisting that the case had ended with the Governor's declaration of a non-suit, and Capt. Dominis refused to appear. The British warship sailed, an American warship arrived and the matter lay dormant until March, 1842, when Sir George Simpson of the Hudson Bay Company was in Honolulu and acted as intermediary (Reynolds, Oct. 8, 12, 14, 18 & 23, 1841, & March 15, 1842; Kekuanaoa, Oct. 13, 1841, FO & ex, AH; Brinsmade to Kamehameha III, Oct. 14 & 19, 1841, U. S. Consular Correspondence). However, as will be shown, Charlton would continue his efforts to gain the right to select half the jurors in any case in which a British subject was a party.

"ATTORNEYS" AGREE UPON A JURY OF TEN

Two months later Skinner and George Pelly, also British, brought suit in the Governor's Court against William French, an American, over the ownership of the Warren Hotel. Stephen Reynolds, an American, represented French and Mr. Robson represented Skinner and Pelly. The day before the trial the two representatives met and agreed to let the case go to a jury of ten persons, who presumably were then assembled by the Governor. The case was argued in the court after which the jurors brought in a unanimous verdict for French (Reynolds, Dec. 9, 10, 28 & 29, 1841; Chamberlain, Dec. 29, 1841).

THE DENIAL OF JURY TRIALS FOR NON-CAPITAL OFFENSES

Criminal offenses which were not capital offenses and did not involve a Frenchman continued to be tried by the governors without a jury, even when Captain Charles Wilkes of the U.S. Explorer Squadron demanded a jury trial "under the treaty" for a sailor convicted of assault with a deadly weapon (Wilkes to Kekuanaoa, Nov. 23, 1841, AH; Kekuanaoa to Wilkes, Nov. 24, 1841, AH; Reynolds, Nov. 23 & 26, 1841) and French Consul Dudoit requested a jury trial for Henry Zupplien, convicted of selling rum to a native (Reynolds, Dec. 7, 1841). When an American, Palmer, was tried for striking a constable, Acting U. S. Consul Hooper was present in court but "allowed" the Governor to fine him ten dollars (Reynolds, Dec. 31, 1841).

THE EXTENSION OF THE RIGHT TO TRIAL BY JURY FOR SOME NON-CAPITAL OFFENSES

However, on May 5, 1842, the first jury statute was enacted and it extended the right to trial by jury and provided an ethnic structure (Kingdom, 1842:Ch. 47). Juries were to be impanelled in all cases of crimes or civil suits in which the amount disputed or the penalty of the crime exceeded $100, and no person was to be subject to "death, banishment or similar severe penalty" without a jury trial. Juries were to be twelve in number and "three fourths of the jury shall be sufficient to decide the case," except for capital offenses when all had to be "perfectly agreed." A jury trial could be had on appeal for a minor criminal offense upon payment of twenty-five dollars, which would be forfeited if the person was convicted.

AN ETHNIC STRUCTURE PROVIDED FOR JURIES

The last section read as follows:

> If the accuser and the accused be both foreigners (*haole*), then the jury (*iure*) shall be made up of foreigners only. If there be no foreigner on either side, then there shall be no foreigner on the jury. If there be a foreigner on one side and a native (*kanaka maoli*) on the other, then in forming the jury, half shall be foreigners and half natives. But if the foreigner accused be a Frenchman, then this law respecting the formation of the jury shall not be applicable. *See French Treaty.*

No consul was provided any role in the selection of a civil jury.

WERE JURORS TO ALSO BE "OCCUPATIONAL PEERS"?

When British Consul Charlton was absent from the islands a few months later he designated Alexander Simpson as acting consul and Simpson proceeded to post a proclamation on the gate of the Fort protesting against the government trying any British subject unless he was present to see that the defendant had a "fair trial." However, the King resolved this matter quickly by refusing to accept Simpson as the British consul (Reynolds, Oct. 10 & 11, 1842).

But the same month a more significant question was raised when George Pelly, representing two Londoners, Sewall and Patrickson, brought suit against the absent Charlton for a debt of $9,000. According to Stephen Reynolds, "[Mrs.] Betsy Charlton sent in a Protest against the jurisdiction of the Govt. Court, & competency of the jurors on ac/t of not being Merchants, that it should have been tried in Valpariso or England!!! & much more like trash..." (Reynolds, Oct. 18, 1842). The foreign jury found against Charlton.

However, only weeks later, in December, 1842, the same Reynolds reported without comment that a jury composed of "Ship Masters" was called in the Governor's Court to decide whether the captain or the owner should bear the loss when the ship "Honolulu" had lost its flying jib boom. The verdict favored the captain (Reynolds, Dec. 1, 1842). Apparently the foreign community believed that many of them were competent peers to judge matters of debt, but that when technical questions about ships and sailing were at issue then occupational expertise was a consideration in determining one's peers.

THE THOMAS "TREATY:" CONSUL JURIES IN CIVIL CASES

However, British Consul Charlton had not forgotten his failure to obtain a half British consul jury when Skinner had sued Dominis in 1841 and when British Lord Paulet imposed the provisional ceding of the Kingdom to Great Britain in February, 1843, one of his demands was for "a new and fair trial" of this suit (Kuykendall, 1938:214). Thus it was no surprise when one of the "Articles of Agreement" forced upon the Kingdom by Admiral Thomas as a condition for the "return of its sovereignty" on July 31, 1843, provided that when a British subject or his property was at issue in a jury trial one half of the jurors "shall be British Subjects approved by the Consul, and all of whom before proceeding to trial shall declare upon oath that they have not prejudged the case..." (*Friend:Extra*, Feb. 20, 1844). What Consul Charlton had demanded in Skinner's suit against Dominis was now to be had.

LEGISLATION TO IMPLEMENT THE THOMAS ARTICLE

Accordingly the King and his Legislature, on August 11, 1843, passed the appropriate legislation while extending it for any foreigner represented in Hawaii by a consul. The second section read:

> ...hereafter in cases where the person or property of any foreigner is brought to trial by jury, one half of the jurors must be his own countrymen, and it is expected that the Foreign Consuls will furnish a list of such persons belonging to their respective countries, as they will approve as Jurymen, and their names are to be kept in a separate ballot-box, out of which one will be drawn alternately with one of those who are to form the other half of the Jury.... (AH).

Dr. Gerrit P. Judd, the Minister of Foreign Affairs, immediately followed up for the government. For example, he requested U. S. Commercial Agent Hooper to submit a list of "such respectable Amn. residents as in your opinion are capable to sit as jurors in cases which may hereafter arise in which the interests of Am. residents here are involved," and Hooper submitted twenty-nine names (Judd to Hooper, Sept. 21, 1843, AH; Hooper to Judd, Sept. 26, 1843, AH).

NEW BRITISH TREATY OF 1844 LIMITS CONSUL JURIES TO CRIMINAL CASES

However, this situation changed most unexpectedly on February 12, 1844, when General William Miller arrived as the new British consul with a proposed treaty which had already been approved by the British government and which presumably superceded the agreement with Admiral Thomas. It basically followed the French LaPlace Treaty of 1839:

> Art III. No British Subject accused of any crime whatever, shall be judged otherwise than by a jury composed of foreign residents, proposed by the British Consul, and accepted by the Government of the Sandwich Islands" (*Friend:Extra*, Feb. 20, 1844).

U. S. Commissioner George Brown, who had previously taken the position that the LaPlace treaty was not binding on the government of Hawaii because it had been coerced, now viewed the jury provision of this British Treaty in a different light, since it had been voluntarily accepted by the government (Brown to Mrs. Brown, Oct. 17, 1844, Haw. Hist. Soc). He immediately protested the article

unless the privilege was also extended to U. S. citizens and Dr. Judd replied that Americans would be placed on the same footings as Englishmen (Brown to Judd, Feb. 14, 1844, FO & Ex, AH).

WHAT IS A "CRIME" UNDER THE CONSUL JURY TREATIES?

The next day the King and *Kuhina Nui* issued a proclamation repealing the second section of the laws of August, 1843 (*Friend:Extra*, Feb. 20, 1844). Five days later, February 17, 1844, Dr. Judd wrote to Lord Aberdeen, the British Foreign Minister, to seek clarification of the consul jury provision:

> It is not believed that it was or ever could be the meaning of Her Britannic Majesty's Government in the third article to stipulate under the words "any crime whatever" that crimes of a trivial nature or petty offenses and misdemeanors should necessarily be tried by a jury, but that the operations of that article will be restricted to cases of crimes usually submitted to juries by our laws (FO & Ex, AH).

Judd argued that such an interpretation would be a serious violation of the Kingdom's independence and sovereignty which had been guaranteed in the Joint British and French Declaration of September 12, 1843. He also sought assurance that the 1844 treaty superseded the Thomas Articles of Agreement of 1843. Judd would receive no answer until October 29.

CONSUL JURY FOR AMERICANS CHARGED WITH MURDER

On March 9, 1844, John Ricord, an American lawyer who had arrived a short time earlier, was appointed Attorney General of the Kingdom. He would soon be challenged by Brown whether or not the consul jury privilege extended to Americans and whether the privilege applied to "any crime whatever." On March 27, 1844, Walter S. Pike and Robert McCarty, white U. S. citizens, along with Jared Von Clief, a Black from New Jersey, deserted the ship "Ontario" at Lahaina, stealing a boat in the process. Their boat was overturned in a storm in the channel and they landed on Lanai at the foot of a cliff. According to Pike and McCarty, they were too exhausted to scale the height, so they drew straws to see who should give his life so the other two could cannibalize him and thus gain enough strength to survive. Von Clief lost. Since the killing took place on shore they were tried for murder at Lahaina. Commissioner Brown was on Maui at the time and he nominated twelve foreigners, six residents of Lahaina and six ship captains, who were accepted by the Governor of Maui. The Governor and one of the judges of the Native Supreme Court conducted the trial. The jury found them not guilty, commenting

that if the Kingdom had had a "manslaughter" statute they would have convicted (U. S. Embassy Dispatches, May 4, 1844).

COUNSEL JURY FOR SAME AMERICANS CHARGED WITH THEFT

Now Pike and McCarty were brought to trial for the theft of the boat. The value of the boat is not stated in any of the remaining documents, but it is of much significance. If the value were "more than two dollars but less than a hundred," the authorized sentence was a fine "four times the amount of the property" (half to the government and half to the property owner) and "hard labor for a term of from four to eight months, as the judges shall determine from the character of the theft" (Kingdom, 1842: Ch. 36, Sec. 2). However, if the value of the stolen property was "more than a hundred dollars," the prescribed sentence provided, first, that the thief "shall pay all the loss sustained by the owner of the property" and, second, that "the thief shall be transported to another land, there to remain for a term of from five to ten years, according to the aggravation of the theft, as decided by the judges (Kingdom, 1842: Ch. 36, Sec. 3). Under the law of Hawaii at that time the first offense would be triable by a district magistrate without a jury, but the second, since it involved banishment, would require a trial by jury (Kingdom, 1842: Ch. 47).

They were tried in the court of the Governor of Maui by a foreign jury proposed by the American Commercial Agent at Maui and accepted by the Governor. They were convicted. If we assume that the value of the boat was more than one hundred dollars, then clearly the consul jury provisions applied because, as specified in Judd's letter to Lord Aberdeen, it fell within that class of "cases of crimes usually submitted to juries by our laws," and the action of the governor in granting a consul jury was quite correct.

However, George Brown does not appear to have taken this possible distinction into account, for without mentioning the value of the boat, he believed that this action meant that "this Government had fully acknowledged the claims of Americans" -- that Americans had a right to a consul jury when charged with "any crime whatever" (Brown to Mrs. Brown, Oct. 17, 1844, Haw. Hist. Soc.).

RAPE IS NOT A CRIME DESERVING A CONSUL JURY

It was during this time of confusion and uncertainty that a case arose which would become an international incident. John Wiley, a carpenter who was a U.S. citizen, was charged with raping a young Hawaiian girl in August, 1844. He was tried by a native magistrate, convicted and given the prescribed sentence, a fifty dollar fine, to which the girl's father had a claim to one half.

Wiley then stated that he wished to appeal for a jury trial and offered to make bail until the final verdict was in. The magistrate insisted that he pay the fine immediately. Wiley then went to U. S. Consul Hooper. As later recounted by Brown:

> ....Mr. Hooper told him he could have a Jury trial, and asked him what Jury he wanted, whether a Jury of half foreigners & half natives, or all foreigners, to the latter of which he had a right if he demanded it. Wiley replied he wished a Jury of all foreigners. Mr. Hooper then called upon the Governor and explained to him the facts, and offered to propose a Jury; the Governor however, did not appear to understand the matter, and referred Mr. H to Dr. Judd, upon whom Mr. H called, and the two nominated a Jury which was acceptable to both parties, and the affair appeared to be arranged. The next day, however, Dr. Judd and a man by the name of Ricord, whom no one knows here, & who had been appointed Attorney General...called upon Mr. Hooper and told him, that as there was no treaty with the U. States, he would not be allowed to propose a Jury. Mr. H was astonished at this, and argued the case with them, alluding to the King's speech, but all to no purpose, when they left. Mr. H then officially addressed the Governor, who is the Judge, demanding a foreign Jury, but he being entirely under the influence & control of Judd & Ricord declined granting it, and told Mr. H he had better refer the case to me, to be settled between me & Dr. Judd. Mr. H then applied to me verbally and I requested him again to see Dr. Judd and if possible induce him to alter his determination, as I did not wish to come in collision with him on this subject, and to urge upon him that it would be an insult to the U. States, should [illegible] Jury be refused (George Brown to Mrs. Brown, Oct. 17, 1844, Haw. Hist. Soc.).[2]

The government's position was that Wiley could have a trial by a regular mixed jury, since there was a native "party," but had no right to a foreign jury, much less a consul jury, first because there was no such treaty with the U. S. and then that Wiley had not been charged with a "crime" but only with an "offense." Finally Judd argued that the jury provisions of the British Treaty of 1844, to which the U. S. consul most often referred, did not exist under "the Law of Nations," but he stopped short of declaring the section of the treaty null and void. This case dragged through diplomatic channels for some months (Kingdom, 1844b).

THE SPOUSE MAY DETERMINE WHETHER ADULTERY IS A "CRIME" DESERVING A CONSUL JURY

Shortly thereafter, on October 1, 1844, Anthony Jenkins, a U.S. citizen married to a native "woman of good character," was convicted of adultery by a native magistrate and fined $30. Jenkins' wife did not exercise her right to a divorce, in which case the sentence could have been "banishment to another land" for four years, and Jenkins' accomplice was not married so that no native husband had claim to half the fine. Acting U.S. Consul Hooper demanded a retrial by a consul jury composed only of foreigners. Governor Kekuanaoa, assisted by Ricord, denied a consul jury on the ground that Jenkins' wife's refusal to claim a divorce, thus removing the possibility of banishment, had eliminated "the criminal part" of the penalty, but he did grant a retrial by a regular foreign jury because no native was claiming part of the fine (*Polynesian*, Oct. 5, 1844). However, Hooper misunderstood this reasoning and jubilantly reported to the U.S. Secretary of State that, since Jenkins' offense was less than Wiley's, "I have reason to believe that in all cases which may hereafter arise the privilege of [an exclusive] Foreign Jury will be allowed," even if it were not a consul jury (U.S. Embassy Dispatches, Sept. 25, 1844).

A *HAOLE* JURY IS A "WHITE" JURY

But the Jenkins' case would have a special significance. It is the first jury case in which the word *haole* is translated as white instead of foreign in the government's official report of the case:

> ....An entirely white jury was drawn from the jury box by the Governor according to the statute. The reason of having an entirely white jury was that no native had a beneficiary interest in the result of the prosecution -the entire fine, if any, accrued to the government; -in other words this was not a quitam action, as in the recent case of John Wiley, where a mixed jury was required by law. There are three kinds of juries provided for by the law "FOR THE REGULATION OF COURTS," chap 47: in one set of cases entirely white jurors -- in another mixed juries composed of an equal number of each; and lastly entirely native. The statute was strictly adhered to in this instance. Jenkins paid his fine and deposited $25 for his jury of appeal (*Polynesian*, Oct. 5, (1844).

A foreign jury was now a white jury.

When Lord Aberdeen's response to Judd's query of February 17, 1844, did arrive on October 29, 1844, it was a decided disappointment to the Hawaiian government. Addressed to British Consul Miller, it said in part:

> ....With regard to the modifications which are desired in certain Articles of the Convention concluded between you and the Sandwich Island Government, and especially those relative to the importation of Wines and Spirits, and to the mode of selection of the juries for the trial of British Subjects, Her Majesty's Government propose to concert with France for admitting such modifications of those provisions as may be mutually satisfactory to all parties (FO & Ex, AH).

"NATURALIZED" HAOLE ARE STILL FOREIGNERS FOR A CIVIL JURY

Now the process which had begun in 1840 of permitting or requiring in some cases foreigners to take an oath of allegiance to the King and become "naturalized subjects" became an issue in the jury selection process (Jones, n.d.). Though not raised formally until November, 1844, the question had been evolving for some time and Stephen Reynolds was a central figure in this evolution. When Commodore Lawrence Kearney, commander of the U. S. East India Squadron, was in Honolulu during the Paulet seizure, it was reported to Reynolds that he had told the King that "...all American citizens, who hold his Commission, were his subjects and must fight for him if need be. They were no longer American citizens" (Reynolds, Aug. 25, 1843). Reynolds would remember this. In June, 1844, George Pelly sued ex-Consul Charlton for slander after Charlton, angry at Pelly for his having been the attorney for Sewall and Patrickson, called him a "sodomist." The foreign jury found in favor of Pelly (Kingdom, 1844a), but Reynolds then recommended to Charlton that he appeal on the ground that the jury was illegally constituted because it included two "naturalized foreigners" while he believed it must be "all foreigners" (Reynolds, June 20, 1844; underline in original). Charlton did not appeal and Pelly, after paying his lawyer, gave the remainder of his award to Mrs. Charlton.

The question was formally raised when a suit was brought by Attorney General Ricord in the name of the Estate of French and Greenway against Charlton and Skinner, a part of the extended and complicated legal proceedings connected to the purported bankruptcy of the partnership of French and Greenway which had begun in 1842. The jury included at least two naturalized foreigners, although Reynolds, its foreman, identified nine as "allegiance men" (Reynolds, Nov. 9, 1844). Charlton argued that "naturalized foreigners" should

be considered "native" under the jury statute and not permitted to serve on the jury in this case. The Court denied this interpretation and ruled that "naturalized foreigners" were still "foreigners" so far as the Jury Statute was concerned. The verdict was nine to three in favor of Charlton (*Polynesian*, Nov. 16, 1844).

"NATURALIZED" HAOLE ARE STILL FOREIGNERS IN A CRIMINAL TRIAL

U.S. Commissioner Brown continued his assault on the judicial system, using a February, 1845, case to question again whether "naturalized foreigners" who were now "subjects of the King" were still "foreigners" for a criminal trial jury. James Gray, American, had been convicted in a magistrates court of assaulting another foreigner and appealed for a jury trial in the Governor's Court. The jury drawn consisted of two "naturalized" and ten other foreigners. Brown, serving as Gray's attorney, challenged this composition, but the governor again ruled that a *haole* who had taken the oath of allegiance to the King was still a "foreigner" for the purpose of the jury statute, citing *Estate of French and Greenway v. Charlton and Skinner* (Kingdom, 1845). Brown argued that such a ruling had been appropriate in that particular case but that a criminal trial was a different matter, but he was again denied (Kingdom, 1845).

AN AGENCY OF THE HAWAIIAN GOVERNMENT IS NATIVE FOR JURIES

The question was raised again when The Hawaiian Treasury Board sued Ladd & Company in August, 1845, for recovery on a promissory note. The jury seated consisted of six natives and six foreigners, one of whom was naturalized. Ladd contended that the jury violated the law of August, 1843, and the Court ruled that law had been repealed by the proclamation of Feb. 13, 1844. Having lost that, the defendant argued that a juror who had taken the oath of allegiance was not a foreigner for jury purposes, but again he was overruled. The Board then agreed to arbitration and the jury was discharged (*Polynesian*, August 23, 1845). However, the case did establish that agencies of the Hawaiian Government were a "native party" under the jury statute.

At the request of the government of Hawaii, Brown was removed as Commissioner in August, 1845. He was replaced by Anthony Ten Eyck and at the same time Alexander G. Abell was appointed U. S. Consul.

THE COURT OF OAHU: A FOREIGN JUDGE FOR FOREIGNERS

The next month Governor Kekuanaoa, in an effort to placate foreigners, "delegated" his judicial authority and powers to try cases involving them to

Lorrin Andrews, a former missionary fluent in Hawaiian, who would sit as Judge of the Court of Oahu (*Polynesian*, Sept. 27, 1845).

U. S. CONSUL TRIES TO PACK A CONSUL JURY

But this did not stop efforts to use the consul jury process to attack the judicial system. In December, 1845, Joseph Holland, a U.S. citizen, was committed for trial on a charge of grand larceny and U.S. Consul Abell was asked to submit a list of prospective jurors. Abell submitted a list of only twelve names, later described by one person as consisting of "seven Americans, two Germans (Clerks to Americans, understood to be opposed to the Government) and three British Subjects, of whom two are reputed to be in the same predicament," and also "contended that no naturalized foreigner could be nominated according to [the Third] Article of the English Treaty" (R.C. Wyllie to Jules Dudoit, April 22, 1846, No. 16, F.O. & Ex, AH). After many days of argument, the question was not settled because Judge Andrews refused to approve Ricord's indictment "because of insufficient evidence" and the case was dismissed (*Polynesian*, Dec. 20, 1845).

The government fought back through a long editorial in *The Polynesian* (Dec. 20, 1845), which said in part:

> ...this Am. Consular jury system is a wicked farce throughout, dangerous to society at large, for it is incompetent to punish....It is also a violation of American and Hawaiian law. It is a contempt of natural right. It is in opposition to the mandates of the divine which say, "He that justifieth the wicked and he that condemeth the just, even they both are an abomination to the Lord."

NATURALIZED FOREIGNERS GRANTED ONLY NATURALIZED FOREIGNER JURORS

A short time later Judge Andrews made a decision which seemed inconsistent with the government's prior position regarding the consequences of naturalization. In January, 1846, Linton Torbert and Benjamin Forbush, two naturalized foreigners, shot and killed a Native, Aki, on Maui. They thought Aki had harmed some of their cattle, which had been causing trouble by invading the fields of the Natives, and had sought to perform a citizen's arrest of Aki after a constable had told them that Aki would soon turn himself in. Aki resisted their "arrest;" he was shot and died; and Torbert and Furbush were brought to Honolulu to be tried for murder in February. To the surprise of many, "the court in interlocutory debate, decided that they were entitled to a

jury of half naturalized subjects and half native, and to be allowed twelve peremptory challenges" (*Polynesian*, Feb. 14, 1846). Three of the six naturalized jurors were former Britons and three former Americans. The defense argued self-defense and provocation. The jury convicted them of manslaughter and they were sentenced to four years imprisonment, commutable for two hundred dollars. *The Polynesian* (Feb. 28, 1846) praised "the good sense and just discrimination, particularly of the native portion of the jury, whose national sympathies were certainly liable to be strongly excited," and added, "It ought to convince foreigners that natives are capable of coming to intelligent decisions even on juries, and that the stigma that has been cast upon them in matters appertaining to juries is totally unfounded in experience." It ended the editorial by calling for the enactment of some new penalty for the offense of manslaughter. Now the principle was established that a naturalized foreigner charged with a serious crime was entitled to a jury on which all the foreigners called would be naturalized.

FRENCH AND BRITISH TREATIES OF 1846: CONSUL JURIES MAY BE MIXED JURIES

The next month, on March 26, 1846, new treaties with Great Britain and France embodied the changes in the consul jury article which these governments had agreed to "in concert." The new provisions broadened those eligible for nomination to include both "native or foreign residents" (*residens indigenes, ou restrangers*), but made no other changes (Kuykendall, 1938: 368-373).

ONLY THE JUDGE DETERMINES IF A STATEMENT IS LIBELLOUS

At this point Attorney General Ricord aroused many of the foreign residents by insisting upon the division of labor between the judge and the jury provided by the common law in a libel suit. In April, 1846, Brinsmade sued James J. Jarvis, editor of *The Polynesian*, for publishing "libellous and slanderous Publications" against him in November, 1845, in connection with the failure of Ladd and Co. He asked for fifty thousand dollars in damages. Judge Andrews assembled a foreign jury, at which point Ricord interceded that this was a mistake as it was solely the decision of the judge to determine whether or not a remark was a libel, after which, if the judge decided in the affirmative, the question of damages would go to the jury. Brinsmade then sought to make the government also a "deep pockets" defendant in the case. The case involved a huge exchange of correspondence between the Kingdom's Minister of Foreign Relations, Robert C. Wyllie, and the British and American consuls. In the end it was declared a nonsuit (Kingdom, 1846). The anti-government foreigners saw this as another effort of the government to deprive them of their jury rights.

THE GOVERNMENT RESISTS EXTENSION OF CONSUL JURIES TO MINOR OFFENSES

Given the conduct of the U.S. consuls and commissioners, the inability of the Hawaiian government to get the consul jury provision removed was most upsetting to Minister Wyllie. On April 22, 1846, he wrote French Consul Dudoit:

> I fear the 3rd Article of the Treaty lately made will only increase this evil, which is one obstructive of all good Government. This opinion frankly stated cannot offend you, for in seven years you have never had occasion to act under the 4th Article of the LaPlace Treaty, so free have French Residents been from any infraction of law that could come under it. I consider that your letter of the 18th September 1844 to my Predecessor gave a correct view of the sense in which that article was to be understood, & also of the sense in which the 3d article of the late treaty should be acted upon. Upon that point Mr. Perrin [the new incoming French Consul] will take the opinion of the French Government, but, as great abuses will certainly be attempted under the 3d Article, I particularly request of you also, in the name of the King, to solicit of the Government of France, with the least possible delay, to state clearly their views upon what is to be the exact interpretation of the 3d Article (FO & Ex., AH).

But some relief would soon come to the Hawaiian government. In May, 1846, the government lodged a formal complaint against Abell with the U.S. Secretary of State and on July 1, 1846, Joel Turrill replaced him as consul and adopted a most friendly posture toward the government, much to the chagrin of Commissioner Ten Eyck, who intensified his anti-government activities. Minister Wyllie, in his August, 1846, report to the legislature proclaimed that the government would continue to resist efforts "to make foreign jurors, nominated by foreign Consuls, the arbiters of the fate of the King's native subjects, where they accuse foreigners of offences that do not amount according to Hawaiian law, to what is considered crime in England or the United States" (*Polynesian*, Aug. 22, 1846; underline in original).

OPPOSITION SUPPORT FOR "JURY NULLIFICATION," ATTACKS ON THE NATIONALITY COMPOSITION OF FOREIGN JURIES AND A DEMAND FOR EXTERRITORIALITY

Before the end of 1846 William L. Lee, an American lawyer who had studied some law at Harvard, had arrived and been appointed a Judge of the Court of Oahu coordinate with Lorrin Andrews. However, assaults on the jury process continued, led by Reynolds and his supporters through their paper, *The Sandwich Island News*. In May, 1847, they reported that jurors were confused whether they were to judge only the facts or the facts and the law and supported the latter position with many British "authorities" (*SIN*, May 12, 1847). The next month they published the foreign jury lists for April, May and June, and analyzed them according to nationality and naturalization status, claiming those on the lists to be disproportionately naturalized and American (*SIN*, June 30, 1847). The next week they editorialized in favor of the United States demanding "extraterritoriality" in Hawaii, drawing heavily upon U. S. Secretary of State Buchanan's report to the U. S. Congress in December, 1846, which had asserted the need for Americans to be tried by U. S. consuls when charged with offenses in "uncivilized and heathen lands" (*SIN*, August 4, 1847).

THE ACT TO ORGANIZE THE JUDICIARY: NATURALIZED FOREIGNERS STILL TO BE FOREIGNERS FOR JURIES

The next month, September, 1847, the Hawaiian Legislature passed "The Third Act to Organize the Government: An Act to Organize the Judiciary" (Kingdom, 1847:1-65), which had been drafted by Ricord and reviewed by Lee. It established a Honolulu Superior Court of Law and Equity with original and appellate jurisdiction. Lee was elected Chief Judge, along with John (Iaone) Ii and Andrews, to the three judge court. It also established four judicial districts. The First District was Oahu; the Second, Maui, Molokai, Lanai and Koohoolawe; the Third, Hawaii; the Fourth, Kauai and Niihau. Each district had one or more Local Circuit Judges who could hear appeals in Chambers (without juries) from District and Police Courts. In addition, at specified terms the Local Circuit Judges were joined by a Judge of the Superior Court, at which time they constituted the Circuit Court of the District and could hold jury trials. Under the Third Act foreign jurors and juries were authorized only for the Superior Court of Honolulu and the Circuit Court of the Second District (Maui), a situation that would last until 1854 when foreign jurors and juries would also be authorized for the Third and Fourth Judicial Districts (Kingdom, 1854:17).

Chapter IV of The Third Act contained detailed procedures for jury selection and trial by jury (*jure*). Article IV, Section VI, specified:

> In all jury cases in which one party is a foreigner (*haole*) and the other a native (*kanaka maoli*), the jury shall be composed of an equal number of natives and foreigners (naturalized or unnaturalized,) [sic] (*he haole hoohiki a hoohiki ole paha*) who shall be drawn alternately from the boxes containing the names of such foreigners and natives as have been summoned to attend the court convened for the trial of such cases.

Section XI then extended the same principles to cases of native Hawaiians and naturalized foreigners accused of a crime:

> All native Hawaiians (*kanaka maoli o Hawaii nui, kanaka Hawaii*) and naturalized foreigners (*haole hoohiki*), when accused of any crime, shall be tried by a jury drawn in the same manner as for the trial of civil cases.

The ruling of Judge Andrews in the trial of Torbert and Furbush conferring a special entitlement to naturalized foreigners to have only naturalized foreigners as the foreigner component of their juries was taken away by the statute.

However, alien foreigners could still have a consul jury, which under the French and British Treaties of 1846 could include both foreigners and natives. Article IV, Sections VII through X covered the consul jury. They ordered the clerk of the Superior Court to send a letter to the appropriate consul asking for thirty-six names whenever "any accused party is an alien foreigner," but specified:

> ....In the case of the refusal or neglect of such consul or consular agent to propose said jurors within ten days after the reception of such request, such refusal or neglect shall be considered as a proposal on the part of said consul or consular agent that the jury for the trial of such accused person or persons shall be drawn from the array of jurors for the trial of civil cases in which any foreigner is a party.

Article IV, Section XXI provided: "No jury for the trial of any civil or criminal case shall be less than twelve in number; but when any nine of such jury shall agree upon a verdict, they may render the same, and such verdict shall be valid and binding upon the parties as if rendered by all twelve."

The chief justice of the Superior Court was authorized to establish a "special jury of inquiry of lunacy, or *de ventre inspiciendo*," and under certain circumstances a special jury could be had "in any case of complication or involving artistical or professional knowledge or skill" (Article III, Section XXIII, and Article IV, Section XIV).

With respect to the role of the jury, Chapter I, Section VIII, declared:

> In all civil cases triable by jury, the jury shall be solely judges of the facts proven before them. They shall not in such cases have power to determine the law applicable to those facts, or the legal construction to be given of any law, or to any contract or agreement, or the legal points arising therein, nor of the jurisdiction of the court over the matter submitted to them, nor of the constitutionality and force of any law; but such constructions, interpretations and questions shall be solely determined by the judge, judges, or other judicial officers before whom the matter is depending; who shall instruct the jury as to the law upon which such facts are to be applied by them in their verdict.

This was reasserted again in Chapter IV, Section XIX.

No similar limitation is spelled out anywhere in the act with respect to a criminal case; the act was simply silent on the "jury nullification" issue in criminal trials. Presumably such a jury could refuse to convict in spite of the evidence if they disapproved of the law or its application to a particular defendant.

U. S. CONSUL DECLINES TO NOMINATE CONSUL JURORS BUT BRITISH CONSUL DOES

These new provisions were quickly tested. In October, 1847, four men, Americans George Morgan and Anthony Jenkins and Britishers Duncan McLean and Joseph Esquith, were arrested for burglarizing James Campbell's residence and taking seven hundred dollars. During the Police Court committal hearing Jenkins testified against the other three and was not indicted. U.S. Consul Turrill did not nominate a consul jury, but British Consul Miller did, so separate trials had to be held by nationality. On November 9 Morgan was tried and convicted by a regular foreign jury (Supreme Court Criminal Case No. 499, AH [hereafter S.C Crim. No. 499]). McLean and Esquith were tried the next day by a British consul jury. Their attorney sought to challenge four of the jurors because they had also served the day before on Morgan's jury, but this was

denied by Judge Lee. McLean was convicted and Esquith acquitted (S.C. Crim. No. 1024, AH).

Now Jenkins, who had testified in the Police Court but then refused to testify in the Superior Court, was indicted. On November 20 Judge Lee requested a list of twenty-four jurors from Consul Turrill. Turrill declined, though he said he would attend the trial:

> ....Believing as I do, that any interference in the organization of the Judicial tribunals of the country, by official Agents of foreign Governments, is, to say the lest [sic] of it, of doubtful policy, I have, in the absence of treaty stipulations conferring that power, come to the determination, not to exercise it in this case, notwithstanding your liberal request for me to do so. In taking this course, so clearly marked out by duty, it affords me great pleasure to know, that the rights of the prisoner cannot in the slightest degree, be prejudiced thereby. During the last year I have examined the printed panels of Jurors...in your Honorable Court. These panels afford a sure guarantee, that by taking the usual course of trials, this issue will be passed upon by upright and intelligent Jurors, who, under the direction of an erudite Judge, cannot fail to come to a decision clearly warranted by the law and the facts of the case (U.S. Consular Corr., Dec. 1, 1847).

Lee immediately thanked Turrill "for the just and praiseworthy course you have adopted. It is one that cannot fail to reflect great credit upon you, and high honor upon the Nation you represent" (U.S. Consular Corr., Dec. 1, 1847). Jenkins was convicted by a regular foreign jury (S.C. Crim. No 260, AH).

Turrill continued this policy, although with the passage of time he apparently did realize that under the Third Act he did have a right to nominate consul juries with or without a treaty. In April 1849 when Prince Jackson, a Black American, was charged with assault and battery with intent to kill a fellow sailor on board their ship in the harbor, Turrill formally declined to exercise his "right" to nominate a consul jury. Jackson was convicted by a regular foreign jury, who rejected his defense of insanity in spite of a great deal of evidence in support of it (S.C. Crim. No. 1025, AH).

TWO MIXED BRITISH CONSUL JURIES

In July, 1850, George Bush, a British butcher, was charged with manslaughter when one of his steers ran loose in the street and a sailor playing

around with it got gored. Consul Miller submitted a mixed list of prospective jurors. When the names were drawn it turned out that eight of them were also present in court for either the regular foreign or native jury. Four were added from the "tales proposed by Consul." One of the first eight was objected to and he was replaced by another from the consul's list. The twelve seated included Judges Kauwahi and Kalama and half-Hawaiians Francis Manini and William Sumner. The jury acquitted Bush (S.C. Crim. No. 107, AH).

In October 1850 Consul Miller again nominated a mixed consul jury for the trial of George Dillon for grand larceny from another foreigner. The trial jury included half-Hawaiians John Sumner, William Sumner, David Adams and Paul Manini. The jury acquitted Dillon (S.C. Crim. No. 161, AH). These two juries were the only two mixed consul juries and they would be the last mixed jury in a criminal trial.

NEW PENAL CODE OF 1850: REGULAR CRIMINAL JURORS TO BE DETERMINED SOLELY BY THE ETHNICITY OF THE DEFENDANT

On September 2, 1850, a new *Penal Code* took effect in the Kingdom (Kingdom, 1850:1-133). While it did not, in fact, add many new forms of crimes, it made some important changes. It made a clear distinction between felonies and misdemeanors and upgraded the seriousness of some offenses, the most noteworthy of which was rape, which was now a felony. There would be no more Wiley cases.

More importantly it assured that in the future no "party," that is, no victim or relative of a victim, would have any claim on any part of the fine or forfeiture which might be imposed as a sentence. Since the only compensation of the police were fees in civil cases and a share of the fines in criminal cases, it also provided that no person entitled to a reward could be admitted as a witness unless he first relinquished his rights to a share of the fine (Kingdom, 1850:130-131).

From now on in a criminal trial the ethnicity of a regular jury would be determined solely by the ethnicity of the defendant. Naturalized or unnaturalized foreigners would have a jury composed only of foreigners, naturalized or unnaturalized. Native defendants would have a jury composed solely of natives. With the possible exception of a consul jury, such as was had in the Bush and Dillon cases, there could be no more mixed juries in criminal cases.

THE CHIEF JUSTICE APPOINTS A CONSUL JURY

In July, 1851 two Americans, Joseph Marks and Dr. Henry Butler were charged with conspiracy to defraud Apong, a prominent Chinese businessman, of $9,000 in gold. They requested a consul jury, but the U. S. consul was away. Their attorney, Charles C. Harris, then requested that the trial be postponed or the charges dismissed. Chief Justice Lee solved the problem by selecting a "consul jury" for them, to which Harris objected to no avail. This special consul jury convicted Marks and Butler (S.C. Crim. No. 526, AH).

In October, 1851, and January, 1852, two Americans were charged with serious felonies, but their right to a consul jury was waived, although it is not clear whether they or the U. S. consul did so. Each was tried and acquitted by a regular foreign jury (S.C. Crim. Nos. 1033 & 662).

NEW BRITISH TREATY OF 1852: NO CONSUL JURY

In May, 1852, a new British Treaty replaced the Treaty of 1846. It relinquished any claim to a British consul jury in express terms, but the right remained under the "most favored nation" clause so long as the French Treaty of 1846 remained in effect. However, the Hawaiian government was optimistic, for the same year the French government authorized negotiations for a new treaty (Kuykendall, 1938:381-382).

A NEW SUPREME COURT

Article 6 of the "Declaration of Rights" of the new *Constitution of Hawaii of 1852* declared that: "The right of trial by jury, in all cases in which it has been heretofore used in this Kingdom, shall remain inviolate forever" (Kingdom, 1852:3). It also established a clear separation of powers. At the top of the judicial branch was a three man Supreme Court with appellate and original jurisdiction. Lee was made Chief Justice with John Ii and Lorrin Andrews as Associate Justices. Andrews would soon be replaced by George M. Robertson. The prior system of Local Circuit Judges and Circuit Courts was retained, but the Supreme Court also became the Circuit (jury) Court for the First District (Oahu). Thus the last time First District Circuit Judge Kapena was joined by Lee or Andrews to hold native jury trials was August, 1852.

ANOTHER BRITISH CONSUL JURY

Richard Fawcett, a British subject, waived his right to request a consul jury when tried for perjury in October, 1852, and was acquitted by a regular foreign jury (S.C. Crim. No. 176, AH), but a British consul jury was selected

when Henry N. Greenwell, a British subject who had sat on Bush's consul jury, was tried in January, 1853, for manslaughter after the death of Salai, one of his Chinese contract laborers on Hawaii, who had been punished twice for running away. The defense argued that Salai was weak and sickly and died from exposure. The prosecutor contended that beating and leaving Salai exposed on the lanai at night contributed to his death, even if it were not intended. Chief Justice Lee's instructions to the jury appear to tell the jury that on the basis of the evidence they must convict Greenwell of some degree of homicide even if they knew Greenwell and believed him a "kind and humane man" (1 Haw. 85). The British consul jury unanimously acquitted Greenwell (S.C. Crim. No. 189, AH). *The Polynesian* (Jan. 15, 1853) editorialized that Lee's instructions made it abundantly clear to all that no master had a legal right to impose any corporal punishment upon a servant under the *Master and Servant Act of 1850* and that a servant could apply to a magistrate to have his master punished in such an instance.

U. S. CONSUL DECLINES IN A NOTORIOUS MURDER CASE

In October, 1855, Andrew G. Francis, an American, was tried for the murder of William Winters, who had been residing at the premises of Rev. Samuel Damon and his wife. Francis, a recently arrived sailor, apparently believed that the Damons were holding prisoner a French woman he had known in California. According to U. S. Commissioner David Gregg, the woman, Madame Roquette, was "suffering from some time past from nervous derangement and hysteria, amounting almost to positive insanity," and was being taken care of by the Damons (King, 1982:256-7). Late one night Francis set out with a gun and knife to kill the Damons and free the woman. He killed Winters thinking he was Damon. U. S. Consul Ogden was asked if he wished to nominate a consul jury and Commissioner Gregg investigated the prior use of such juries. Consul Ogden declined to nominate and restricted his role to seeing that Francis had "good counsel and a fair trial" (Ogden to Marcy, U.S. Embassy Dispatches, Oct. 17, 1855). Francis' counsels, John P. Griswold and Charles C. Harris, presented an insanity defense, four physicians presented conflicting "expert opinions" on the question and the foreign jury ended up hung (S.C. Crim. No. 182, AH; *Polynesian*, Oct. 13, 1855). Before Francis was tried again word came from San Francisco that Francis "had been a Lunatic there for some time previous to his leaving for the Sandwich Islands." Francis was discharged to the custody of Consul Ogden and was returned to San Francisco (*Polynesian*, April 17, 1856).

BRITISH CONSUL JURY GRANTED IN A MISDEMEANOR CASE

In December, 1856, two hotel owners, Joseph Booth and Louis Franconi, were convicted in the Police Court of the misdemeanor offense of common nuisance for holding public dances which encouraged the mixing of "females that are known to be public Strumpets and of doubtful character" with "males who have heretofore maintained a good reputation," which "tends plainly and directly to the corruption of the morals, honesty, and good habits of the people." Each was fined one hundred dollars.

However, the situation quickly became complicated. Chief Justice Lee was very ill of tuberculosis. His death was anticipated by everyone, and there was a great deal of speculation about his possible successor. Acting Chief Justice Robertson was known to covet the position. Alexander Campbell, a recently arrived lawyer from the United States, also viewed as a likely candidate in some quarters, was employed to represent Booth and Franconi. After the conviction of the defendants in the Police Court Campbell filed appeals for trials *de novo* with consul juries in the Supreme Court. His affidavits requested a British consul jury for Booth and a French consul jury for Franconi. In the latter affidavit he specified that Franconi was "born in Belgium of French parents."

Much to the surprise of many, Robertson granted the request to give Booth a jury from a list nominated by the British consul, thus reversing the position held by the government since 1844 that consul juries were not available to foreigners charged only with a misdemeanor. In January, 1857, Booth was found not guilty by his British consul jury (S.C. Crim. No. 110, AH) and the Franconi case was continued to the April Term of Court.

ATTORNEY DISBARRED FOR "FALSELY" CLAIMING A CONSUL JURY

However, in late March Justice Robertson charged Campbell with deliberately misleading him in his request for a French consul jury, alleging that Campbell knew that Franconi was not French. Campbell responded with an "intemperate" letter in which he accused Robertson of ignorance about proper procedure and demanded a hearing on the very question of whether or not Franconi was French. Robertson denied the demand for a hearing, then disbarred Campbell because of his "misconduct toward the court" (*Advertiser*, April 2, 1857). The case against Franconi was then *nolle prossed*, after which Robertson announced a new rule:

> It is hereby ordered, that every foreigner charged with a crime and claiming the right to be tried by a jury proposed by the Consul of his nation, shall, either by himself or by his counsel, file a written notice to that effect with the Clerk of the Court, setting forth under oath, that such foreigner is a subject or citizen of the nation whose consular intervention he claims (*Polynesian*, April 11, 1857).

Chief Justice Lee, now literally on his death bed, refused to intervene. Justice Robertson had eliminated a major competitor to be Lee's successor, but in the process his reputation was so damaged that he had also eliminated himself. Lee was succeeded as Chief Justice by Elisha Allen, formerly a U. S. Commissioner and Minister of Finance of the Kingdom. In August Allen reaffirmed Campbell's expulsion from the bar and in December Campbell returned to the United States.

A BRITISH SAILOR ON A U. S. SHIP IS NOT AN AMERICAN FOR CONSUL JURY PURPOSES AND CONSUL JURORS CAN BE CHALLENGED BY THE PROSECUTOR

The next consul jury occurred at Lahaina, Maui, in May, 1857. Three sailors, William Tammas, Thomas Courtright and John Scott were charged with assaulting a police officer, punishable by "a fine not exceeding one thousand dollars, and imprisonment at hard labor not exceeding three years" (Kingdom, 1850:17). Tammas and Courtright were Americans and requested a consul jury. Scott was by birth a British subject, but as no British consul was available he claimed the right to a U. S. consul jury on the ground that he had arrived at Lahaina as a seaman on a U. S. ship. Justice Robertson and Local Circuit Judge John Richardson granted a U. S. consul jury for Tammas and Courtright, but denied this to Scott. The consul at Lahaina, Anson Chandler, nominated the jury list for Tammas and Courtright, and each of the defendants were granted a separate trial. Tammas went first and his attorneys, Paul C. Ducorron and Mr. Farwell, argued that the jurors nominated by the consul could not be challenged by the prosecutor. The Court ruled that this contention was "absurd." The trial proceeded and Tammas was found not guilty (2d Cir. Crim. No. 2599, AH; *Polynesian*, May 23, 1857).

OPTIMISM ABOUT A NEW FRENCH TREATY

On September 8, 1858, after years of contention, the King agreed to a proposed new treaty with France which had no consul jury provision, but only if the French government agreed to certain additional interpretations of some of its provisions.

A NATURALIZED *HAOLE* CANNOT HAVE A NATIVE JURY

While awaiting this agreement the basic allocation of native/foreign criminal juries was challenged from an unexpected direction. Charles F. Burns, a foreigner variously described as "a quack" and "a well known amateur practitioner of medicine and surgery," was tried at Lahaina for murder in the second degree for causing the death of Maiho by maltreatment. Attorney Farwell requested a native jury on the grounds that Burns could not get a fair trial from a foreign jury and as a naturalized subject he was "entitled to a native jury." Justice Robertson and Judge Richardson denied the request because a foreign jury would be "a jury of his peers." Burns was convicted and sentenced to five years imprisonment (2d Cir. Crim. No. 590, AH; *Polynesian*, Sept. 4 & Nov. 20, 1858).

THE LAST CONSUL JURY

In May, 1859, it was learned that France had rejected the additional article. On May 26, 1859 the King ratified the original 1858 version but now had to await its final acceptance by France. The same month the new *Civil Code of 1859* was adopted without any changes in the jury provisions (Kingdom, 1859).

In mid-August, 1859, Joseph Watson, a sailor of the Australian barque "Oreste" en route from San Francisco to Australia, told his captain, Thomas Mason, that he wished to leave the ship at Honolulu. Mason then took Watson and several other crewmen for a sail in his longboat. While outside the reef Captain Mason was alleged to have taunted and beaten Watson with the tiller. Watson jumped overboard and Mason returned to shore, having made no attempt to rescue Watson. Second Mate Thomas Fitzgerald, who had been on the ride, went to the authorities and filed a complaint, for which Captain Mason had Fitzgerald placed in irons. Mason was charged with murder in the second degree, a nonbailable offense, since it carried a possible penalty of "imprisonment ... for a term of years, exceeding ten" (Kingdom, 1850:121), and was committed to the jail for trial at the October Term. The Court denied the request by British Consul W. L. Green that Thomas be granted bail and Green then demanded an expedited trial before a British consul jury. Chief Justice Allen granted both requests and a special session of the Court was held on September 19 to try Thomas. The trial was marked by the jury's request to visit the longboat, by the aggressive questioning of Fitzgerald by one of the jurors, by Allen's advice to the jury that the testimony of a ship captain is usually more credible than that of crewmen, and by an unusually long time for the jury to reach a verdict (over four hours), while twice announcing during their deliberations that they were "hung." Finally Captain Thomas was acquitted by

a vote of eleven to one (S. C. Crim. No. 507). Ten days later *The Polynesian* (Oct. 1, 1859) celebrated that "at last" the "Oreste" was out of Hawaii's waters. This is the last Consul Jury case we have found.

A NEW FRENCH TREATY AND THE CONSUL JURY STATUTE REPEALED

On January 21, 1860, the Emperor of France promulgated the new Hawaiian-French Treaty, known as the Treaty of September 8, 1858, and on June 17, 1862, the Legislature repealed Sections 1192 through 1195 of the *Civil Code* (Kingdom, 1862:8). No longer would a consul jury be available to any alien foreigner. They would be tried by a regular foreign jury.

A COMPARISON OF THE COMPOSITION AND PERFORMANCE OF THE CRIMINAL JURIES OF THE 1850'S

With the appearance of the last consul jury, we can compare the composition and performances of the three kinds of criminal juries on Oahu for the ten years, 1850-1859. Rather detailed data on the progress of criminal cases through the Superior Court and the Supreme Court are presented in Table 1.

Fifty-one different individuals composed the sixty sitting jurors for the five British consul jury trials, which tried five British subjects. Using the base of sixty, we find that 63.3 percent were nonnaturalized foreigners (nationality unknown), 21.7 percent naturalized former British subjects, 10 percent *haole*-Hawaiians, 3.3 percent Hawaiians and 1.7 percent naturalized former U.S. citizens. As shown in Table 1, the five trials produced five verdicts of not guilty.

The regular foreign jurors consisted of 280 individuals, 16.1 percent of whom were naturalized former Americans, 8.9 naturalized former Britishers, 0.7 percent naturalized former Germans, and 74.3 percent nonnaturalized foreigners (nationality unknown). All had Northern European surnames. Naturalized foreigners were 31.1 percent and nonnaturalized foreigners 68.9 percent of the 972 sitting jurors in 81 regular foreign jury trials. They tried the cases of sixty-one white and twenty-six Chinese defendants. The overall conviction rate was 55.2 percent, with a rate of 52.5 percent for the whites and 61.5 percent for the Chinese. Foreign juries trying white defendants were far more likely to produce a "hung" jury than any of the other categories, where hung juries were rather unusual. Perhaps this was explained in part by the writer of a letter to the *Weekly Argus* (Jan. 28, 1852) who complained that the backgrounds of the foreign jurors were too disparate to "adjudicate laws of which they are ignorant."

There were 1,032 sitting native jurors in 86 trials involving 140 defendants. We cannot as yet produce a solid estimate of the number of individuals involved because of the variations in spelling which we find in the records. A native juror without a Hawaiian surname was extremely rare, less than one percent. The conviction rate of these juries was 43.6 percent.

These varying jury conviction rates were also consistent with the likelihood that one would be convicted if indicted and convicted if brought to trial. As shown in Table 1, the conviction rates for those indicted were 59.6 percent for Chinese defendants, 49.5 percent for white defendants, 36.4 percent for Hawaiian defendants and 0.0 percent for the "British subjects." We should note that the fact that these courts held a term of court only every three months was particularly advantageous to Hawaiian defendants whose prosecutions were especially likely to be handicapped by witnesses who had departed the Kingdom. In contrast, almost half the Chinese defendants were tried in 1856, when there was much talk of a "Chinese crime wave," their cases often involved burglary and larceny charges after the defendants were caught in the act or found with the stolen property, and there were permanent residents as the witnesses against them (Lim-Chong and Ball, 1992). The same cluster of characteristics was most likely to result in the conviction of a white.

HAOLE-HAWAIIANS ARE NATIVES FOR JURY PURPOSES

But some questions still remained. As the numbers of part-Hawaiians increased, how would they be classified under the jury statute. In 1867 Mele Kokai was brought to trial on Kauai charged with poisoning her husband with arsenic. Through her attorney, C. Claude Jones, she requested a foreign jury on the ground that she was "three-fourths foreign." Chief Justice Allen and Local Circuit Judge Duncan McBryde denied the request and the native jury found her not guilty (5th Cir. Crim. No. 457, AH) because the "[t]estimony of the Chinese witnesses was so variable from what they had sworn on a former occasion" (*Advertiser*, Nov. 1, 1867). Anyone with any native Hawaiian ancestry would continue to be classed as native under the jury statute.

A NEW APPEALS COURT FOR OAHU

In 1874 the legislature eliminated the Local Circuit Judgeship for the First District (Oahu) and established an Intermediary Court of Appeals to hear appeals in chambers (no jury) from the District and Police Courts of Oahu. The judges of the Intermediary Court were the individual justices of the Supreme Court (Kingdom, 1874:9-11). This Court existed from 1874 through 1892.

Table 1 Numbers and Percentages of Criminal Cases, Defendants and Convictions in the Honolulu Superior Court and Supreme Court by Ethnicity of Defendants and Kind of Jury: 1850-1859

	British Consul Jury	--Foreign Jury-- Chinese Deft.	White Deft.	Native Jury
CASES				
Number Filed*	5	31	95	169
Number To Trial	5	29	72	118
Percent to Trial	100.0	93.5	75.8	69.8
DEFENDANTS				
Number Charged	5	47	109	275
Percent Convicted	0.0	59.6	49.5	36.4
Number to Trial	5	39	82	179
Percent to Trial	100.0	83.0	75.2	65.1
Percent Convicted	0.0	71.8	65.9	55.9
DISPOSITIONS OF DEFENDANTS				
Pleas of Guilty				
Number of Cases	0	7	15	36
Number Defts.	0	11	19	36
Percent of Tried	0.0	28.2	23.2	20.1
Percent Convicted	0.0	100.0	100.0	100.0
Trial w/o Jury				
Number of Trials	0	1	2	2
Number Defts.	0	1	2	3
Percent of Tried	0.0	2.6	2.4	1.7
Percent Convicted	0.0	100.0	100.0	66.7
Tried by Jury				
Number of Juries	5	22	59**	86***
Number Defts.	5	26	61	140
Percent of Tried	100.0	66.7	74.4	78.2
Percent "Hung"	0.0	3.8	16.4	0.7
Percent Convicted	0.0	61.5	52.5	43.6

* Cases could be filed either by the commitment of the defendant(s) for trial by an inferior judge or by an appeal by the defendant(s) from a conviction by an inferior judge.

** There were two more juries than there were cases tried by juries, for in two cases an initial hung jury resulted in a second jury trial.

*** There were two more juries than there were cases tried by juries, for in one case an initial hung jury resulted in a second jury trial and in another Chief Justice Lee misread the guilty verdict of a native jury and acquitted the two defendants, but he corrected his error by giving the two defendants a second jury trial the next day, at which they were duly convicted.

A RARE CASE OF A CHINESE ON A FOREIGN JURY

As the numbers of Chinese, especially those who had become naturalized subjects of the King, increased in the Kingdom, would a foreign, that is, *haole*, jury continue to consist only of whites? Thus far only one Oahu case has been discovered which represented an exception to this rule. In April, 1877, Apo, Chinese, was brought to trial in the Supreme Court charged with selling opium. His Foreign Jury consisted of eleven Whites and one Chinese, Ah See. Apo was acquitted by a vote of nine to three, with Ah See voting with the majority (S.C. Crim. No. 94, AH).

This absence of Chinese jurors as "peers" persisted even though the Chinese population grew substantially beginning in the 1850's, as did their numbers as defendants in criminal cases and parties in civil cases. Rather, their exclusion from juries demonstrates that community pluralism had its limits and was closely related to the ability of an ethnic group to make credible demands on the government, which in effect meant demands backed up by a foreign state. Although there were always more Chinese than Frenchmen in Hawaii beginning in 1789, the Chinese government had little interest in them. By the middle of the century extraterritoriality had been imposed on China and it had lost any ability to send a warship to protect the interests of overseas Chinese. No effort was made to designate a Chinese consul until late in the century. Even the general citizenship rights of the Chinese in Hawaii would decline after 1887. Participation on juries by persons of Chinese ancestry would have to await the twentieth century.

THE IMPACT OF THE WILCOX REBELLION

In 1889 Robert Wilcox, a part-Hawaiian who had spent some years in Italy and become an admirer of Garibaldi, led an armed rebellion against the government. After he and his followers had been overcome by the private foreign armies, they were brought to trial. One European, a Belgian named Albert Loomens, was convicted by a foreign jury of treason and sentenced to death, which was commuted to one year in prison and then banishment (S. C. Crim. No. 1367, AH), and one Chinese, Ho Fon, a journalist, was convicted by a foreign jury of conspiracy and fined two hundred and fifty dollars (S.C. Crim. No. 1370, AH).

As described by Daws (1968:257-8), "Wilcox himself was charged with treason....but it was obvious that no jury composed of native Hawaiians would ever convict him of a capital offense. In the end he was tried for conspiracy. The evidence against him was overwhelming....Wilcox was found not guilty by a vote of nine to three, and he emerged with a greater following among the natives than he had had before" (S.C. Crim. Nos. 1372 & 1380, AH). All the various charges of treason, conspiracy or mutiny were dismissed against most of his other followers, including Kahuakai, Kaona, Jack Kuamoo, S. Pua, Robert Boyd, H.P.K. Mulani, George Markham, Joseph M. Poepoe, Alexander Smith, James Kauhane, Kamakea, Kanamu and Luhi (S.C. Crim. Nos. 1368, 1369, 1373 and 1376, AH).

CHIEF JUSTICE RECOMMENDS CHANGES IN THE JURY SYSTEM

An examination of the kinds of disputes brought as "actions at law" and those brought as "equity" cases suggests that in many instances aggrieved parties sought to mold their dispute into an equitable format in order to avoid a jury trial and that this practice increased with the passage of time.

In 1892 the Legislature undertook to enact a major reorganization of the judiciary. In his report to the legislature (Kingdom, 1892a:5-6), Chief Justice Alfred F. Judd reported that the ethnic jury system "has given rise to many perplexing questions which have been variously decided by different judges," especially when one party was a corporation. He gave several examples, including:

> ....Where a domestic corporation composed of foreigners and natives sues a native Hawaiian, what should the jury be made of? Often all the parties on one side and all but one on the other side are native Hawaiians. Should the fact that one foreigner is a party entitle him to have six foreigners on the jury?"

Judd recommended,

> ....Either a statute should be passed which will provide particularly for all the cases which may arise, or the distinction between Hawaiian, foreign and mixed juries be altogether abolished. To provide that all cases, civil or criminal, should be tried by juries drawn from all nationalities resident here, the same being suitable persons, would remove all the questions suggested above.

He believed, "Such a system would in the end tend to allay race prejudices and would assist in educating the people in the duties of good citizenship."

NEW COURT STRUCTURE INCREASES OPPORTUNITIES FOR JURY TRIALS FOR MINOR OFFENSES

However, no major changes were made in the jury statutes, but there was a major revamping of the courts. The Supreme Court was made exclusively an appellate court, the Circuit Courts became the general trial courts and the District Courts were given parallel jurisdiction with the Police Courts. The Intermediary Court of Appeals, that is, the justices of the former Supreme Court hearing appeals from the District and Police Courts in Chambers, was eliminated and this had great significance for jury trials. Now appeals from these lower courts went directly to the First Circuit Court where they could receive a trial *de novo* with a jury (Kingdom, 1892b:90-125).

THE OVERTHROW OF THE MONARCHY

In January, 1893, the Monarchy was overthrown with the assistance of the minister and military forces of the United States (Blount, 1893). A Provisional Government headed by President Sanford Dole was established, fully expecting annexation by the United States. When this did not occur the Provisional Government moved to establish its legitimacy by having a convention in 1894 to adopt a constitution for the Republic of Hawaii. Editor H. N. Castle of the *Advertiser* regretted that the proposed constitution still retained a right to trial by jury, which he described as "an antiquated machinery" (June 26, 1894). *The Constitution of 1894* did retain the right to trial by jury and the ethnic jury system remained on the statute books (Republic, 1897:3 & 517-527).

JURY COMPOSITIONS AND PERFORMANCES IN 1883, 1887 and 1893

However, everything was not the same. After the overthrow jurors had to take an oath of loyalty to the new regimes (Provisional Government, 1894:10; Republic, 1897:46). Thus, comparisons of the compositions and performances of criminal trial juries on Oahu for 1883, 1887 and 1893, presented in Table 2, are illuminating (Moriyama, n.d.). 1883 was early in the administration of Prime Minister Walter M. Gibson, 1887 was the year of political turbulence in which the whites forced King Kalakaua to drop Gibson and accept the "Bayonet Constitution," and the cases in 1893 are after the overthrow of the Monarchy. The first point to note is the great increase in the number of jury trials in 1893 due to the changes in the structure of the courts enacted in 1892. In contrast to 1883 and 1887, the vast majority of these jury trials were for misdemeanor offenses appealed from the District and Police Courts.

As shown in Table 2, almost 80 percent of the Hawaiian jurors in 1883 and 1887 had Hawaiian surnames, but this dropped to 62 percent in 1893. The

percentage of defendants convicted was 36.4, 62.5 and 23.6 respectively. It was almost impossible to get a native jury to convict the increased number of Hawaiians charged with illegal liquor sales or possession of lottery tickets in 1893.

Every one of the foreign jurors in 1883 and 1887 had Northern European surnames, as did 96.7 percent in 1893. These juries convicted 20.0 percent of the defendants in 1883, 46.6 percent in 1887 and 39.5 percent in 1893. The percentages of the defendants tried by these jurors who were Chinese increased from 50.0 percent to 60.0 percent to 65.6 percent, but in 1887 and 1893 these Chinese defendants generally were less likely to be convicted than were the white defendants. On the other hand, the persons who were most likely to be convicted by these juries were Chinese or Japanese charged with the illegal sale of liquor, that is, encroaching upon a significant white monopoly.

Table 2 Foreign and Native Jury Composition by Ethnic Surnames and Conviction Rates by Ethnicity of Defendants: 1883, 1887, 1893

	------1883-----		------1887-----		------1893-----	
	Foreign	Native	Foreign	Native	Foreign	Native
JURIES						
No. Trials	7	17	13	7	33	44
No. Individ.	50	65	77	53	91	108
No. Sitting	108	204	156	84	396	528
SURNAMES						
% No. Europ.	100.0	12.2	100.0	20.2	96.7	35.2
% So. Europ.	---	2.9	---	2.4	3.3	1.9
% Chinese	---	---	---	---	---	0.9
% Hawaiian	---	78.9	---	77.4	---	62.0
DEFENDANTS						
Total Number	10	22	5	8	38	55
% Convicted	20.0	36.4	46.6	62.5	39.5	23.6
Chinese		5		9		25
% Convicted		40.0		33.3		32.0
Whites		5		6		11
% Convicted		0.0		66.7		45.5
Japanese		0		0		2
% Convicted		---		---		100.0
Haole-Hawaiian		1		1		9
% Convicted		100.0		.0		11.1
Hawaiian		21		7		46
% Convicted		33.3		71.4		26.1

The low conviction rates in 1893 for both kinds of juries reflect the degree to which the juries were acquitting defendants of any ethnicity who were appealing the increased number of convictions in the lower courts under the liquor, organized gambling and opium possession laws. The results suggest that being of Northern European ancestry or being *haole*-Hawaiian did not guarantee agreement with the policies of the new government.

MILITARY TRIBUNALS IN 1895: NO HAWAIIAN JURY

In January, 1895, a number of Hawaiians, part-Hawaiians and a few *haole* attempted an armed uprising with the intention of restoring Queen Lili'uokalani to her throne. Dole declared martial law, the uprising was put down and about one hundred persons taken prisoner or arrested, including Queen Lili'uokalani. A special military tribunal, headed by Circuit Judge William Austin Whiting, now a Colonel, began its trials, thus avoiding the requirement that Hawaiians be tried in the criminal courts by native juries. On February 5 the Queen was brought to trial for "misprison of treason," prosecuted by William A. Kinney and defended by Paul Neumann. Among other things Neumann challenged the legality of the entire proceeding, using the argument that Garner Anthony would later use in the United States Supreme Court during World War II (Anthony, 1955), that "if there was any necessity for martial law it had long ceased to exist" and that the civilian courts were open and being employed for all other offenses, including those committed during the so-called war. The Queen was convicted.

Protests arose in several foreign capitals about these "trials" and by January 1, 1896, all but one of those imprisoned had been released, having pledged not to join or abet any movements against the Republic. The Queen did not receive her full pardon until October, 1896, at which time she sailed for the United States to oppose annexation (Loomis, 1976:103-215).

ANNEXATION BY THE UNITED STATES

On July 7, 1898, President McKinley signed a joint resolution by the United States Senate and House of Representatives approving the proposed Treaty of Annexation of Hawaii and the "transfer of sovereignty" took place on August 12, 1898. A special joint committee was sent to the islands to review all the laws to determine which might be repugnant to the Constitution of the United States. The ethnic jury system of Hawaii was among the first provisions designated as "inconsistent."

THE ORGANIC ACT: REPEAL OF THE ETHNIC JURY STATUTES

When the United States Congress enacted the Organic Act of April 30, 1900, which in effect became the constitution of the Territory of Hawaii, it repealed sections 1329, 1331, 1332, 1347 to 1354 of the Hawaii *Civil Laws of 1897* (United States, 1900:sec. 7). The native/foreign jury system in criminal cases and the native/foreign/mixed jury system in civil cases were gone. The last clear vestige of the sovereignty of the *kanaka maoli o Hawaii nei* and one of the last legal recognitions that they and the *haole* represented at least two different nations within a single sovereign state were gone. Issues of ethnic representation on juries in Hawaii would henceforth be determined by the Supreme Court of the United States and the Supreme Court of the State of Hawaii.

NOTES

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2. We wish to thank Jane Silverman for providing us with a copy of this letter.

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8 Juvenile Commitments Under the Kingdom: 1865-1886

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INTRODUCTION

In his history of the "Boys' Training School" in Hawaii from 1865 to 1939, which was based largely upon official reports, Myron Thompson (1953: 14, 15) noted that "there was no mention of reasons for commitment before 1871" and that systematic breakdowns of reasons for commitments did not begin until the report of the Board of Education in 1897, although the President of the Board did report in 1884 that a large proportion of the commitments were for "larceny and truancy." Recently Kuniyoshi (1989:62-68) demonstrated that one could begin to fill this gap by utilizing original commitment documents preserved in the Hawaii State Archives.[1]

However, that demonstration was based upon the then available commitment papers for only each 5th year between 1865 and 1884 and thus included only sixty-two juveniles, roughly 17 percent of the estimated 354 commitments between those years. This new analysis of the commitments and the juveniles committed is based upon documents for 278,[2] about 72 percent of the estimated 385 total commitments between March, 1865, and January, 1886. As shown in Table 1, this includes about 87 percent of the commitments for the time periods 1865-69 (87%), 1870-74 (85%) and 1882-86 (90%), which will be treated as the three periods for purposes of comparing time periods. Letters for only twelve juveniles have been found for the calendar years 1875-1881, which is probably only about 13 percent of the commitments for that period, and these years will be omitted from the time series analyses presented in this paper.

These commitments will be examined regarding (1) the committing courts, (2) the complaining agents, (3) the types of offenses or grounds for commitment, (4) the terms (duration) of commitment, (5) the age, (6) sex and (7) ethnicity of the juveniles committed, and (8) any changes of these variables over time. However, first will be presented a brief history of the establishment of the Industrial and Reformatory School, followed by a presentation of the statutorily authorized grounds for commitment to the Reformatory.

THE ESTABLISHMENT OF THE REFORMATORY

In 1864, Kamehameha V (Lydecker, 1918: 102) informed his Legislature that "A Reformatory Industrial School for young persons who are not subject to, or who disregard, parental authority, is very much needed, and a plan for the establishment of such an institution will be submitted to you."

Table 1 **A Comparison of the Numbers of Admissions Reported by the Board of Education and the Numbers of Letters of Commitment by Bienniums and Calendar Years, 1864-1886**

BIENNIUM[a] & (CALENDAR) YEARS	BD. OF EDUC. REPORTS Pop.at End[b]	Number Admit[b]	Cum. Freq[c]	COMMITMENT LETTERS Biennium Number[d]	Cum. Freq[c]	Calendar Yr. Number	Cum. Freq[c]
1864-66	15	17	17	10 (59%)	10 (59%)		
(1865)						7	7
1866-68	33	38	55	44 (116%)	54 (98%)		
(1866)						22	29
(1867)						19	48
1868-70	44	46	101	34 (74%)	88 (87%)		
(1868)						15	63
(1869)						17	80
1870-72	57	72	72	73 (101%)	73 (101%)		
(1870)						29	109
(1871)						37	146
1872-74	56	36	108	31 (86%)	104 (96%)		
(1872)						27	173
(1873)						14	187
1874-76	47	38	146	20 (53%)	124 (85%)		
(1874)						15	202
(1875)						5	207
1876-78	53	30	30	0 (0%)	0 (0%)		
(1876)						0	207
(1877)						0	207
1878-80	57	19	49	2 (11%)	2 (4%)		
(1878)						0	207
(1879)						2	209
1880-82	49	22	71	9 (41%)	11 (6%)		
(1880)						0	209
(1881)						5	214
1882-84	53	36	36	35 (97%)	35 (97%)		
(1882)						10	224
(1883)						22	246
1884-86	52	[31][e]	[67][e]	25 [81%][e]	60 [90%][e]		
(1884)						17	263
(1885)						11	274
(1886)[f]						4	278
1886-88	12	n.a.	n.a.	n.a.			
1888-90	10	n.a.	n.a.	n.a.		n.a.	

[a]The "Biennium Years" begin on April 1 of the first year and end on March 31 of the last year.
[b]The Reformatory's population at the end of each biennium and the number of admissions during each biennium were obtained from the biennial Reports to the Legislature by the President of the Kingdom's Board of Education.
[c]The cumulative frequencies are for each of the major time periods indicated by the horizontal lines.
[d]The commitment letters are from the Miscellaneous Letter File of the Board of Education at the Hawaii State Archive, Honolulu.
[e]The number of admissions for 1884-86 are not included in that Biennial Report. The number for this period (31) is an educated guess.
[f]The 1886 letters have been grouped here because they were all for the month of January, 1886.

The Legislature responded by passing "An Act Authorizing the Board of Education to Establish an Industrial and Reformatory School, for the Care and Education of Helpless and Neglected Children, as [sic] also for the Reformation of Juvenile Offenders," and it was approved by the King and took effect on December 30, 1864 (Laws, 1864-1865: 32-35). This statute was repealed and replaced by an Act of July 21, 1870, which was effective September 21, 1870 (Laws, 1870:59-63). While this 1870 Act made a number of changes in the law, it continued most of the principles and concepts of the 1864 Act.

The 1864 enabling act stated that the sole purpose of the Reformatory was "the detention, management, reformation, education, and maintenance of such children as shall be committed or surrendered thereto," and the 1870 Act added the words, "as Orphans, Vagrants, Truants, living an idle or dissolute life, who shall be convicted of any crime or misdemeanor, who shall be surrendered to the Board of Education as guardians thereof, for the term of their minority or who shall be received at such Schools as hereinafter provided" (Laws, 1870:60).

Although the 1864 Act (Sec. 9) authorized the Board to establish "branch schools" on the other islands "when said institution proves to be self-supporting, and a surplus of funds accruing from the labor of the children, is on hand," and the 1870 Act (Sec. 3) authorized additional schools "in any part of the Kingdom, when the same shall be deemed necessary, and when funds shall be available by Legislative appropriation," no additional schools were established.

STATUTORY GROUNDS FOR COMMITMENT

Thus there were two routes to the Reformatory, one judicial and one parental. That is, a child could be committed by a Police or District Judge or could be "surrendered" by the parents or guardian.

In the latter instance, the child was surrendered for the term of his or her minority (1864 Act, Sec. 7; 1870 Act, Sec. 7). The 1870 Act (Sec. 8) also authorized the Board "in its discretion" to receive "the children under fifteen years of age, of parents, guardians or adoptive parents, who desire the same," and to charge fees for such children when such was "proper."

The judicial route contained several distinctions. First, although the *Penal Code of 1850* (Ch. IV, Sec. 2) declared that between the ages of seven and fourteen years "competency to commit any alleged offense" was to be "determined by the evidence of the case, without any general presumption for

"determined by the evidence of the case, without any general presumption for or against the same," the 1864 Act (Sec. 4) provided: "if, upon any trial, it shall appear to [the Police or District Judges] that the person on trial is under the age of thirteen years, and had done an act, which, if done by a person of full age, would warrant a conviction of the crime or misdemeanor charged, then they shall have power to commit such child to the ... School." Thus in the cases of children between the ages of seven and twelve, the Judge did not have to inquire into their competency if he exercised his discretion to commit them to the Reformatory without a formal criminal conviction, and this provision applied to both misdemeanor and felony charges. However, this provision was completely repealed in the 1870 Act (Sec. 1).

Second, in the cases of "all offenders under fifteen years of age" who were "duly convicted" of an offense within the jurisdiction of a Police or District Court (that is, misdemeanors, including vagrancy), the judges could commit the offender to the Industrial School "in all cases where they deem such commitment to be more suitable than the punishment now authorized by law" (1864 Act, Sec. 4; 1870 Act, Sec. 5, with minor language changes).

These cases could include the offense of "continued, willful and obstinate disobedience" by a child over ten years of age. Under the *Civil Code of 1859* (Sec. 757)[3] such a child, upon the complaint of the parent or guardian, could be sentenced by a Police or District Judge to ten days imprisonment at hard labor, but beginning in 1865 such a child between the ages of eleven and fourteen could be given an alternative commitment to the Reformatory.

Third, the Police and District Judges could "sentence" to the School "any child under fifteen years of age, who lives an idle or dissolute life, whose parents are dead, or, if living, from drukenness [sic], or other vices or causes, neglect to provide any suitable employment, or exercise any salutary control over such child." Application for such a "sentence" or commitment could be made by "any member of the Board of Education, or their agents, the Attorney General or his Deputy duly authorized, the Marshall, Sheriff, or Deputy Sheriff on any Island, or of any three subjects of this Kingdom" (1864 Act, Sec. 4). The 1870 Act (Sec. 6) eliminated the three subjects of the Kingdom as lawful applicants.

A short time later the Legislature passed "An Act To Repeal Chapter 10 of the Civil Code, And To Regulate The Bureau Of Public Instruction" (Laws, 1864-5:43). It continued mandatory school attendance of children (first legislated in 1840), but it lowered the upper age by one year. Sections 20 and 21 made attendance at "some lawful school, public or private," mandatory for all children "from their sixth to their fifteenth years." The teacher, school agent

or Inspector General was to file a complaint with the Police or District Judge whenever a child "shall persist in absenting himself from school," and the child and the "father or mother, or guardian or adoptive parent" were to be summoned before the Judge. If it was proved that the child's truancy was because the adult "has not used proper diligence to enforce the child's regular attendance at school," the adult was to be fined up to five dollars, and in default of payment to be "subjected to imprisonment at hard labor for a term not to exceed fourteen days." If the truancy were found to be the fault of the child, the statute directed that "the Police or District Justice shall send him to a Reformatory and Industrial School, for a term not less than one month, or more than six months, or otherwise sentence him to a fine not exceeding two dollars, or imprisonment at hard labor for a term not exceeding ten days." This act was approved on January 10, 1865, and took effect on March 10, 1865, but on July 6, 1866, it was amended to change the term of commitment to the Industrial school from one to six months to "a term not less than six months nor more than two years" (Laws, 1866:7-8). Thus, if the behaviors of the child included truancy or persistent absence from school the age of eligibility for commitment extended to those fifteen.

ANALYSES AND FINDINGS

The General Commitment Rate

It is important to consider our findings with the general demographic situation of this time period in mind. According to the official censuses of these years, the total population of the Kingdom was 62,959 in 1866 and 80,578 in 1884, and there were 8,721 males and 7,957 females "under the age of fifteen" in 1866 and 11,704 males and 10,819 females "fifteen and under" in 1884. At the same time, given our estimate of a total of 385 commitments between 1865 and 1885, there was an average of only about 25 commitments per year, which would approximate a rate of about six per thousand youngsters between the ages of six and fifteen years of age.

The Committing Court

As indicated, the committing courts were to be the Police and District Courts of the islands of the Kingdom, and fully 74 percent of the commitments were from such courts on Oahu, even though judging by the censuses from 1866 to 1884 Oahu contained only about 31 percent of the juvenile population of the Kingdom. Hawaii with about 33 percent of the juveniles contributed 12 percent

of the total commitments; Maui with 26 percent contributed 8 percent; and Kauai with 10 percent contributed 6 percent.

Moreover, 99.5 percent of the Oahu commitments were from the Honolulu Police Court. There are several possible explanations for the disproportionality of the commitments: (a) neighbor island judges may have been very hesitant to send children so far from their homes; (b) the systems of formal supervision may have been greater in Honolulu, thus increasing the likelihood of the children's delinquencies bringing them into court; and (c) "adventuresome" neighbor island children may have been drawn to the excitement or opportunities of the major port city where they were subsequently picked up as "street children." At the same time it must be kept in mind that the Honolulu Police Court had an islandwide jurisdiction and the commitment letters do not indicate the parental place of residence. Thus, the Honolulu commitments cannot be classified on the basis of the parents' places of residence by the districts of Oahu or even between Oahu and the Neighbor Islands.

Whatever the causes, this dominance of the Honolulu Police Court appears to have persisted throughout the time period, with 72 percent in 1865-69, 78 percent in 1870-74 (when Maui fell to 4%), and 70 percent in 1882-86 (when Hawaii rose to 20% and Kauai fell to less than 2%).

Grounds for Commitment

One or more grounds for commitment were specified for 276 of the 278 juveniles. These are provided in Table 2, where they have been grouped in the four general categories which will be used hereafter. The first three categories -- Larceny, Public Disorder, and Vagrancy -- represent conduct proscribed by the Penal Code and thus could have brought the juveniles before a court had they been adults. The fourth category, Truancy, represents the Status Offenses of that period. "Disobedience," which was also a status offense, did not appear as the sole ground for commitment in any of these cases.

In Table 2 we see that 39.6 percent of the commitments contained the single ground of a "larceny." When we combine these larceny cases with the small numbers of "burglary" and "larceny plus" cases (only three of which were truancy), the Larceny Category reaches 43.5 percent.

Another 31.6 percent of the commitments contained the sole ground of "truancy," and when these cases are combined with "truancy plus disobedience" the pure status offense category of Truancy reaches 33.8 percent. The Larceny and Truancy categories combined total 77.3 percent of the cases.

Table 2 Frequency and Percentage Distributions of the Grounds For the 278 Commitments: 1865-1886

GROUND	f	Percent
LARCENY	121	43.5
Burglary	4	1.4
Larceny	110	39.6
Larceny + Vagrancy	4	1.4
Larceny + Truancy	3	1.1
PUBLIC DISORDER	12	4.3
Malicious Mischief	3	1.1
Common Nuisance	3	1.1
Drunk	2	0.7
Other	4	1.4
VAGRANCY	49	17.6
Idle & Dissolute,	20	7.2
Vagrant, + Disobedient.	29	10.4
I & D + Truancy.		
TRUANCY	94	33.8
Truancy & Disobedient	6	2.2
Truancy	88	31.6
NOT SPECIFIED	2	0.7
TOTAL	278	100.0

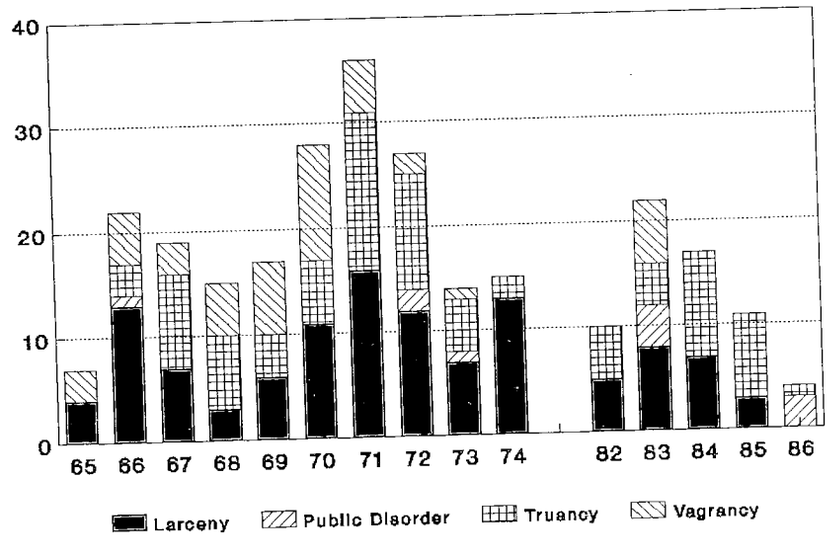
While another 10.4 percent of the commitments included the ground of "truancy," this truancy appears to be presented as one element in the juveniles "vagrancy" or "idle and dissolute" lifestyle, and this latter charge has been given primacy in the placement of these cases in the major categories. This Vagrancy Category contained 17.6 percent of the cases, leaving only a small 4.3 percent for the offenses within the category of Public Disorder.

Changes in the Grounds Through Time

Utilizing these four primary offense categories, one finds considerable yearly variation in the numbers of commitments and the grounds for commitment. As shown in Figure 1, within the three major time periods, the annual number of commitments varied from 7 to 22 (1865-69), 14 to 37 (1870-74), and 10 to 22 (1882-1886). Similar changes were found in the grounds for commitment. Thus, as shown in Figure 1, Larceny was the ground

in 59 percent of the commitments in 1866, but this fell to 37 percent in 1867 and 20 percent in 1868, after which it rose each succeeding year until it hit 87 percent in 1874. Similar year-to-year volatility can be seen for the ground of Truancy.

Figure 1 Offense Types by Years (Missing Records Period, 1875-1881)

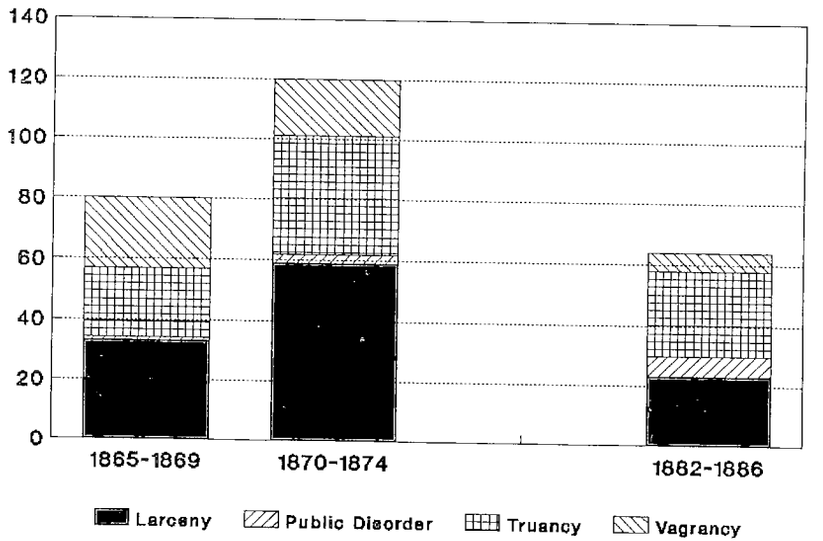


However, as shown in Figure 2, there is less change when the grounds are compared for the three grouped time periods. Larceny is clearly the modal ground in the first two periods, but it falls to second place in 1882-85. Truancy is tied with Vagrancy for second place in the first time period, but it then increases until it is the modal ground in 1882-85. On the other hand, Vagrancy shows a steady decline, falling to the bottom in 1882-85. Public Disorder offenses hardly exist as a ground until the last period, when they account for 11 percent of the commitments.

One must be hesitant, however, to assume that these changes in grounds were a measure of changes in the behaviors of the juveniles or a heightened sensitivity of the officials to truancy *per se*. For the three time periods the combined totals for Vagrancy and Truancy were 57.5 percent, 47.5 percent and 53.1 percent. It is possible that the steady decline of Vagrancy and the steady rise of Truancy as the stated ground for commitment represented a change in the "administrative style" of the committing judges, wherein the relatively easy

establishment of "truancy" ended the inquiry without a need to establish the other elements associated with an "idle and dissolute" lifestyle.

Figure 2 Offense Types by Time Periods (Missing Records Period, 1875-1881)



Committing Court and Grounds for Commitment

We may ask whether or not the grounds for commitment of Oahu courts, which made 74 percent of the commitments, varied from the grounds employed by the Neighbor Island courts? A comparison of the Oahu commitments with the combined Neighbor Islands commitments produced very similar patterns. Placing the Oahu percentage first, the percentages of grounds were as follows: Larceny 43.4/43.8; Public Disorder 3.4/6.8; Vagrancy 18.5/15.1; Truancy 34.2/32.9. However, there was one striking variation among the Neighbor Island courts; fully 50 percent of the commitments from Kauai were in the Vagrancy category, compared to only 3 percent from Hawaii and 5 percent from Maui.

The Complainant and the Grounds

As the review of the statutes indicated, a variety of parties might be the complainant or the petitioner in these juvenile cases, and one would expect the relationships of these parties to the juvenile to vary depending upon the grounds for commitment. As shown in Table 3, these persons were identified by name and/or relationship in 127 (46%) of the cases, and 60 percent of these were an identifiable police officer, 27 percent a parent or relative, and 13 percent a teacher or other school official.

When these categories are related to the grounds for commitment in these 127 cases, the pattern is as one would expect under the statutory scheme. Thus, an identifiable police officer was the complainant in 98 percent of the Larceny commitments and in 83 percent of the Public Disorder cases, but in only 30 percent of the Vagrancy and Truancy cases. A parent or relative was the petitioner in 2 percent of the Larceny, 17 percent of the Public Disorder, 38 percent of the Truancy, and 61 percent of the Vagrancy commitments. Finally, a teacher or other school official was the petitioner in 9 percent of the Vagrancy and 32 percent of the Truancy commitments.

The Terms of Commitment

The letters could specify one of two kinds of term of commitment, either for the period of a youngster's minority or for a specific number of months, and the term was specified in 274 (98.6%) of the commitments. Of this total, 49.6 percent were minority commitments, 2.9 percent were one to three months, 11.7 percent for six months, 8.0 percent for one year and 22.6 percent were for two years. This left a small 5.2 percent with various straight sentences in years ranging from three to seven and one-half years.

As shown in Table 3, the terms of commitment varied considerably by offense. Of those charged with Larceny, 65 percent received minority commitments and 28 percent were sentenced to either six months, one year or two-year terms, and the same pattern was found for Public Disorder cases. On the other hand, minority commitments were found in only 31 percent of the Truancy commitments, with 43 percent being for two years and 20 percent being one year. Vagrancy cases fell in between, with 46 percent receiving minority commitments and most of the rest divided between one year and two year terms. The one and two year terms in these Vagrancy cases were quite frequent when the commitment letter included the additional ground of truancy.

Table 3 Frequencies of Commitment Terms by Grounds for Commitment and Type of Petitioner

TERM & PETITIONER	LARCENY	PUBLIC DISORDER	VAGRANCY	TRUANCY	TOTAL
ONE TO THREE MONTHS					
Unspecified	4	0	2	1	7
Police	0	0	0	0	0
Relative	0	0	0	0	0
Teacher	0	0	1	0	1
Subtotal	4	0	3	1	8
SIX MONTHS					
Unspecified	17	0	2	8	27
Police	1	0	0	0	1
Relative	0	0	0	0	0
Teacher	0	0	0	4	4
Subtotal	18	0	2	12	32
ONE YEAR					
Unspecified	6	0	5	4	15
Police	1	2	0	0	3
Relative	1	0	1	1	3
Teacher	0	0	0	1	1
Subtotal	8	2	6	6	22
TWO YEARS					
Unspecified	4	0	4	22	30
Police	3	1	2	3	9
Relative	0	0	7	9	16
Teacher	0	0	0	6	6
Subtotal	7	1	13	40	61
THREE YEARS TO SEVEN AND ONE HALF YEARS					
Unspecified	3	1	0	5	9
Police	2	0	1	0	3
Relative	0	0	0	1	1
Teacher	0	0	1	0	1
Subtotal	5	1	2	6	14
MINORITY					
Unspecified	34	5	12	7	58
Police	43	2	4	11	60
Relative	0	1	6	7	14
Teacher	0	0	0	4	4
Subtotal	77	8	22	29	136
TOTAL	119	12	48	94	273
Unspecified	68	6	25	47	146
Police	50	5	7	14	76
Relative	1	1	14	18	34
Teacher	0	0	2	15	17

Those cases where "truancy" was stated as the sole ground for commitment but in which the commitment is for something other than "a term not less than six months nor more than two years" constitute a special problem. As shown above, the truancy statute was quite specific after 1866 in providing this sentence for truancy, and the statute did not mention any other alternative such as a commitment for the period of a juvenile's minority or for a specific period in excess of two years. The data in Table 3 show clearly that such a strict reading of the authority of the judges would mean that at least 37 percent of the juveniles committed for the sole ground of truancy were given an unlawful term of commitment.

Several possible explanations of this inconsistency were examined. The first possibility was that these 35 children were orphans. However, only five of the 278 commitments specified that the juvenile was an orphan and, although all of these orphans were committed for the period of their minority, only one of them was a Truancy commitment, the other four being for an "idle and dissolute life." A second possibility was that they were committed at the request of a parent or guardian, and such a person is identified in 8 or 23 percent of these 29 cases, but a relative was also identified in 17 percent of the Truancy commitments with terms of two years or less.

Finally we may note on the basis of the available evidence that in Truancy cases the likelihood of a minority commitment increased considerably when a specific police officer was identified in the commitment letter. In these instances the minority commitment rate shot up to 79 percent, in contrast to 22 percent when there is no identifiable officer. This finding suggests that something more than truancy plus being an orphan or truancy plus a parental request was involved in at least some of those cases in which a youngster was given a minority commitment on the sole ground of truancy.

However, it should be noted that the term of commitments were not a measure of the actual duration of the commitments and this information is not known except for isolated cases. Two examples of minority commitments being released early are recorded in these letters: 1) Kalike who was committed in 1865 was released by the judge in 1866, and 2) Thomas who was committed in 1866 was released in 1867. Section 6 (Laws, 1864-1865: 32-35) cited the judges' power to discharge a juvenile for the following reasons: 1) apprenticeship, 2) adoption, and 3) application by parent or guardian.[4]

The Ages of the Juvenile Committees

Reasonably precise ages were given in 199 (72%) of the commitments. Most of the other commitments included an age reference, such as "under

fifteen" or "under ten," but these ambiguous cases were excluded from this analysis. The 199 cases were grouped into four age categories which approximate four quartiles: six to nine (24.6%), ten (21.6%), eleven and twelve (26.1%), and thirteen to fifteen (27.6%). These age brackets broken down by offense categories, the percentage within each age-offense cell given minority commitments, and the mean, median and modal ages for each offense category are presented in Table 4.

Table 4 Percentage Distributions of Ages by Grounds for Commitment and of Grounds by Ages, and Percent given Minority Commitments by Ages and Grounds

AGE & MINORITY TERM	GROUNDS FOR COMMITMENT				
	Larceny	Public Disorder	Vagrancy	Truancy	Total
6-9 Yrs.	19.54	0.00	22.58	34.29	24.62
	(34.69)	(0.00)	(14.28)	(48.00)	(100.00)
Minority	82.35	0.00	71.43	50.00	62.27
10 Yrs.	20.69	25.00	29.03	18.57	21.61
	(41.86)	(4.65)	(20.93)	(30.23)	(100.00)
Minority	83.33	50.00	44.44	30.77	55.81
11-12 Yrs.	26.44	37.50	16.13	28.57	26.13
	(44.23)	(5.77)	(9.62)	(38.46)	(100.00)
Minority	69.56	67.67	60.00	25.00	50.00
13-15 Yrs.	33.33	37.50	32.26	18.57	27.64
	(52.73)	(5.45)	(18.18)	(23.64)	(100.00)
Minority	68.96	67.67	50.00	61.54	63.64
TOTAL	100.00	100.00	100.00	100.00	100.00
	(43.72)	(4.02)	(15.58)	(35.18)	(100.00)
Minority	74.71	62.50	54.84	41.43	58.83
AGES					
Mean	11.30	12.25	10.87	10.55	10.98
Median	11.95	12.50	11.00	10.88	10.38
Mode	10.00	14.00	10.00	10.00	10.00
NUMBER	87.00	8.00	31.00	70.00	199.00

The range of ages was six years to fifteen years, but there were only two six year olds and two fifteen year olds, so 98 percent of the children were

between seven and fourteen years of age. The modal age was ten years for all offense categories except Public Disorder, where it was fourteen, but there was a clear pattern for the juveniles committed for either Larceny, Public Disorder or Vagrancy offenses to be older than those committed for Truancy. Thus one-third or more of the Larceny, Public Disorder and Vagrancy commitments involved juveniles thirteen to fifteen, while one-third of the Truancy commitments were children six to nine years old.

Fifty-nine percent of these 199 youngsters were given minority commitments. In general Larceny commitments were most likely and Truancy commitments least likely to receive a minority commitment regardless of age. Thus, three quarters of the children committed for larceny were given minority commitments, with this sentence being given to over 80 percent of those between six and ten and about 70 percent of those between eleven and fifteen. Similarly 71 percent of the youngest Vagrancy commitments involved minority commitments in contrast to only 50 percent of the other Vagrancy cases, and two thirds of the juveniles eleven years old and older committed for Public Disorder received minority commitments. The minority commitments for Truancy had a peculiar age pattern, with the highest percentages of minority commitments in the youngest and the oldest age brackets. It was suspected that this peculiar pattern within the Truancy cases might have been due to the older truants also having the additional ground of "Disobedience," but an examination of the individual cases found this not to be the case.

The Ethnic Names of the Juveniles

The commitment letters do not specify the ethnicity of the juveniles. Therefore, each individual was assigned an ethnicity only on the basis of his or her name, noting at the outset that 224 (81%) of the names consisted of a single word, such as "Keoni" or "Thomas." This procedure could not distinguish part-Hawaiians who conceivably could be in any of the name groupings. Four ethnic name categories emerged, which were distributed as follows: Hawaiian 89.9 percent, Haole 8.3 percent, Chinese 1.4 percent, and Portuguese 0.4 percent. The first Chinese name case appeared in 1872 and the only Portuguese case was in 1885 (seven years after the beginning of the Portuguese immigration). This should not be interpreted to mean that Portuguese youngsters had a low level truancy. According to the Board of Education Report of 1886, nonattendance of Portuguese children was seen as a serious problem, but the cause was the resistance of the parents to send their children to school and not the fault of the children.

The percentages in the Hawaiian and Haole categories were quite stable in the three comparative time periods and only the Hawaiian (250) and Haole

(23) name groupings were of a sufficient size to attempt any comparisons. The two groups were rather similar regarding the grounds for commitment, with a note that the Hawaiian category was slightly more likely to be committed for Larceny (44% to 32%), slightly less likely to be committed for Public Disorder (4% to 9%) or Truancy (33% to 41%) than the Haole category. With respect to the terms of commitment, 64 percent of the Haole name grouping received minority commitments in contrast to only 48 percent of the Hawaiian. A partial explanation for this last may be found in the facts that the Haole grouping had a lower median age (10.5 to 11.4 years) and was more likely to have a specific police officer identified in the commitment letter (35% to 26%). Teachers or other school officials appeared as named petitioners only in Hawaiian cases.

The Sex Composition of the Juveniles

One may have become curious why the discussions to this point have not regularly included analyses on the basis of sex. This is because the commitment letters included only eleven girls, that is, only four percent of the total. This small number is not a result of a disproportionate loss of the commitment letters for the females, for the Board of Education's report to the Legislature in 1884 stated that up to that time only nine girls had been committed to the Industrial School. Since the last commitment letter of a female is dated January, 1882, the eleven commitments contained in the letters are two more than the Board believed had been committed during the time period of this study.

The girls were not separated out of the preceding analyses because the characteristics of the girls are generally quite similar to the characteristics of the boys. Thus, 64 percent were committed by the Honolulu Police Court; 45 percent were committed for Larceny, 9 percent for Public Disorder, 27 percent for Vagrancy and 18 percent for Truancy. Two-thirds were committed for the period of their minority. While their commitments for Truancy appear low and their minority terms appear high in comparison with the boys, these differences lose almost all their significance because 91 percent of these commitments occurred prior to 1873 when the proportion of persons committed for Truancy was lower than in 1882-1886 and that persons committed for Larceny were more likely to receive a minority commitment than those sentenced for Truancy.

Still a note should be made of three differences for the girls: girls were clearly less likely to be committed than boys, girls were very unlikely to be committed after 1873, and very young girls probably were not committed. The evidence is scant, but although the mode of the ages of the seven girls whose ages were given is ten years, the same as the boys, there are no cases found with a stated age below ten, although 26 percent of the boys were below the age of ten.

SUMMARY AND CONCLUSIONS

It should be stressed that there can be no straightforward comparison of the data presented above with the composition of the current population of the Hawaii Youth Correctional Facility (HYCF) because of the very substantial differences in the statutory grounds for commitment in 1865-1886 and 1991 (Isaac and Griffin, 1989).

The Industrial and Reformatory School opened in 1865, and the statutes provided for the commitment of children (1) who had committed offenses which would be crimes if committed by an adult,[5] (2) who were improperly supervised or vagrant and "living an idle and dissolute life," (3) who were regularly truant from school where the fault did not lie with the responsible adult, and (4) who were "surrendered" to the school by their parent or guardian.

Throughout the period under study a vast disproportion of the commitments were ordered by the Honolulu Police Court. The ground for most of the commitments was either larceny or truancy, but there was an apparent shift over time from a predominance of larceny to a predominance of truancy, and the evidence suggests that this may have reflected an administrative practice based upon the fact that it was quite easy for the police to establish the fact of truancy even though the case might also have involved elements of "an idle and dissolute life" or suspected criminality. Youngsters committed for a criminal offense were far more likely to be committed for the period of their minority than those committed for truancy, with the vagrants falling in between. However, over a third of the truancy commitments exceeded the statutory maximum of two years, and the only explanation we can offer is the administrative innovation referred to above. The ages of the youngsters ranged from six to fifteen, with a median and mode of about ten years. About ninety percent of the youngsters had singular or Hawaiian names and another eight percent had Haole names. Finally, only four percent of the commitments were of girls, only one girl was committed after 1873, and no case was found of a girl under the age of ten. However, the profile of offenses or grounds for commitment of the girls was very similar to that of the boys for the early periods.

It is our hope that at some future time additional commitment letters will be located in the Hawaii State Archives so that further documentation of the commitment process can be made for the periods 1875-1881 and 1886-1893.

NOTES

1. We would like to thank Herbert Arai (Archivist, Hawaii State Archives) for locating the letters of commitment which are not indexed. There are 267 letters for 278 juveniles.

2. Thirty-eight of the letters were translated from Hawaiian to English by Jason Achiu (Hawaiian Translator, Hawaii State Archives).

3. In Kuniyoshi (1989: 51), it is incorrectly cited as the *Penal Code of 1850*.

4. In another set of unindexed files which were titled "Letters," there were letters which requested boys to be apprenticed for plantation work.

   A dramatic instance of the discharge process occurred right after the end of the period covered in this paper when twenty-four of the teenagers were discharged to serve as crew members and the band of the Hawaii naval vessel *H.M.S. Kaimiloa* when King Kalakaua and Prime Minister Walter Murray Gibson were seeking to establish a confederation with Samoa (Bailey, 1980: 208; Adler and Kamins, 1986: 180-182). This development is clearly reflected in the resident population figures for March, 1888 and 1890, as shown in Table 1.

5. During this time period, there was no "Juvenile Court" *per se* and a juvenile offender was not automatically sent to the Reformatory for a criminal offense. Kuniyoshi (1989) documents several cases with juveniles being committed to the prison at hard labor as the Reformatory was a disposition alternative.

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9 Gambling, Lotteries and the Law in 19th Century Hawaii[1]

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Editor's Note: This article is the product of Mr. Shaner's continued research on a topic which he researched for an undergraduate term paper that received the Hormann Award in 1990.

If Socrates and Plato had trouble defining what morality was, how can people come along, just like that, and lay down that gambling is immoral?

--Meyer Lansky

INTRODUCTION

During the last decade several bills have been introduced in the legislature of Hawaii to do what many other states have done and establish a state lottery, but no state lottery bill has passed. Many charitable organizations in Hawaii would like to run bingo games and raffles to raise money, but such activities are illegal. Each year many residents of Hawaii travel to Las Vegas to gamble in the casinos, but every effort to legalize casinos in Hawaii has been rejected, and in 1990 the state legislature extended its prohibitions to include off-shore gambling operations on cruise ships using Hawaii ports.

On the other hand, "social gambling" is legal in Hawaii and no one who has resided in Hawaii for long would doubt that gambling in a variety of forms, some quite commercial, is widespread.

In this article I examine the law and gambling, especially lotteries and other commercial gaming, in nineteenth century Hawaii. I look at the practices of the indigenous population, the impact of the missionary morality and the continuing struggles as other immigrants brought new forms of and attitudes toward gambling. Finally it is in this context that I examine the discriminatory law enforcement policies, the problem of the corruption of the police, the role of a proposed international lottery in the overthrow of the monarchy and the consequent prohibition imposed by the United States Congress against any Territorial legislature legalizing a lottery.

GAMBLING AND THE INDIGENOUS HAWAIIAN CULTURE

Although the Hawaiians had no written descriptions of their cultural practices prior to the arrival of foreigners, the weight of the evidence indicates that the Hawaiians had a deep fascination in engaging in highly competitive

contests and games and that gambling (*piliwaiwai*) was an integral part of these activities. This "gambling culture" served the purposes of both recreation and social solidarity. It was socially accepted, even expected by *ali'i* and *maka'ainana*, that one would wager on specific games or events and one could gain status by being recognized as an expert in the art. Thus, Kaneakama, identified as "a great gambler," was a central figure in the oral tradition of the origins of Kalaipahoa, the great poison god (Ellis, 1963:53). According to Malo (1951:219-233) the games and contests associated with gambling included running races (*kukini*), rolling of stones (*maika*), surf riding (*he'enalu*) and sledding (*holua*). He described the process when bets were taken at a running race

> Those who thought one man was the faster runner of the two bet their property on him, and those who thought the other was faster, bet their property on him. When people had made their bets, the experts came to judge by physical examination which of the two runners was likely to win, after which they made their bets. One man, after staking all his property, pledged his wife and his own body (*pili hihia*), another man bet property he had borrowed from another (*pili kaua*). When all the pledges had been deposited (*kieke*, literally bagged), the betting was at an end. (Malo, 1951:219)

GAMBLING AND THE FIRST FOREIGNERS

The foreigners who came to the islands beginning in 1778 brought new games, especially card games, which were also associated with gambling. These men, ship captains, seamen, traders and artisans in the service of Kamehameha I, gambled both among themselves and with the natives. Corney (1896:106), who visited the islands in 1816, reported, "The natives are very great gamblers," and noted that the chiefs had also taken to the Western card games: "They are fond of cards, and play whist, all-fours, and nosey, extremely well. They often gamble away houses, lands, canoes, and even the clothes off their backs."

THE OVERTHROW OF THE INDIGENOUS RELIGION

In 1819 as part of the process by which Liholiho succeeded Kamehameha I as *ali'i nui* and one of Kamehameha's queens, Ka'ahumanu, became *kuhina nui* (co-authority with the king), there took place the well known "abolition of the kapu," which constituted a major change in the political and religious constitution of the kingdom (Davenport, 1969).

AMERICAN PROTESTANTISM AS THE NEW STATE RELIGION

While the Hawaiians were in the initial process of adjusting to the vast changes associated with the abolition of the *kapu*, the first company of American missionaries arrived in 1820. These missionaries were Calvinist fundamentalist and their austere beliefs immediately clashed with many of the native practices. Their core tenets of the "spirit of labor" and the immorality of idleness, and even most play, came into direct conflict with the gaming and gambling morality of the Hawaiians. The missionaries looked upon gambling as sinful in its intent of seeking wealth without productive labor and immoral in its consequences.

It is clear that the mere arrival of the missionaries had no effect upon the enjoyment of gambling of the Hawaiians, especially the chiefs. The layman printer of the mission described one game (*Noah* or *Poohenehene*):

> ....A description of this play in which the king, and chiefs spend much time, may not be uninteresting. Five bunches of tappa folded up are laid close to each other on the ground. One man then takes a stone, and passing his hand under each of the tappas, leaves it under one of them. Another man then strikes on top of the bunches, and if he avoids the one which has the stone under it, he wins. Eight or ten men divided into two parties are usually engaged at one game, at which they generally bet some thing. (Loomis, April 6, 1821)

On more than one occasion the engagement of an important chief in a gambling game interfered with the efforts of the missionaries to bring them to religious services or to begin their reading lessons. In January, 1822, Hiram Bingham invited several of the chiefs to attend Sunday service, most of whom declined. According to Bingham, the Prime Minister (*Kalaimoku*),

> ....Kalanimoku, engaged in gambling, offered an excuse unrivalled as to its frankness, ingenuity, and courteousness, from a heathen or a gambler, saying, "I have business and cannot go -- my heart will be with you, though my body is here." (Bingham, 1847:157)

The conversion process of the chiefs by the missionaries was facilitated greatly by the arrival of several English and Tahitian missionaries in the spring of 1822. The ability of the Tahitians to read and write in Tahitian had a considerable impact upon the Hawaiian chiefs. In April, 1822, two of the English missionaries visited the house of one of the queens, where the Tahitians were staying.

> ....we found three woman and a man playing at cards (whist), for money, with all the cool, keen interest, and stern self-possession, of inveterate gamblers. One of the persons sitting by said that these games often ended in quarrels, when not hands only, but clubs, were furiously employed. He confessed that it was a bad custom, but that they knew no better, not having received "the good word," as the Tahitians had. One of the queens coming in threw herself upon the floor, yet with an air of no unconscious superiority, and professed a desire to learn the things which had been taught to the South Sea islanders, observing, that if the king would give his consent they should all be willing to be taught. (Tyerman and Bennet, 1832: 40-1)

The queen who was so eager to learn to read was probably Kamamalu, but the same could not be said for the more powerful Ka'ahumanu, who found it difficult to suspend her card playing to engage in serious reading lessons. It was August, 1822, before the missionaries reported any success in this respect, but thereafter in characteristic fashion she ordered all her attendants to learn to read (Bingham, 1847: 164-5).

William Ellis, the English missionary who led the English and Tahitians in Hawaii in 1822-23, had some sympathy for the games and sports of the Polynesians but no tolerance for the gambling associated with them.

> There are some few who play merely for pleasure; but the greater part engage in it in hopes of gain.
>
> Were their games followed solely as sources of amusement, they would be comparatively harmless; but the demoralizing influence of the various kinds of gambling existing among them is very extensive....
>
> We have seen females hazarding their beads, scissors, cloth-beating mallets, and every piece of cloth they possessed, except what they wore, on a throw of the uru or pahe.
>
> In the same throng might be frequently seen the farmer with his o-o, and other implements of husbandry; the builder of canoes, with his hatchets and adzes; and some poor man, with a knife, and the mat on which he slept, -- all eager to stake every article they possessed on the success of their favorite player; and when they have lost all, we have known them frantic with rage, tear their hair from their heads on the spot. (Ellis, 1963:135-6)

However, Ellis was a man of hope. After noting that since the beginning of Christian instruction the games were observed "much less followed than formerly," he wrote:

> ...we hope the period is fast approaching, when they shall only be the healthful exercises of children, and when the time and strength devoted to purposes so useless, and often injurious, shall be employed in cultivating their fertile soil, augmenting their sources of individual and social happiness, and securing to themselves the enjoyment of the comforts and privileges of civilized and Christian life. (Ellis, 1963:136)

Ellis' optimism was not entirely misplaced. In December, 1823, Kalanimoku "commanded the observance of the Sabbath and ... forbid the people to cook their food on the Sabbath or so much as kindle a fire" (Chamberlain, Dec. 21, 1823). According to Marin, the proclamation prohibited "gaming, going in canoes, & all kinds of work on the Sabbath" (Marin, Dec. 21, 1823).

However, no move toward a general prohibition of gambling (*pili waiwai*) would take place until the late 1820's. Liholiho had died in England and been succeeded by the adolescent Kauikeaouli (Kamehameha III). The dominant chiefs, led by Ka'ahumanu, had been converted by the missionaries and the kingdom was now a theocratic state. It was the duty of the chiefs to use their authority to enforce the dictates of the new god so far as this was possible and prudent.

THE FIRST LAW PROHIBITING GAMBLING: 1827

The first printed criminal code of the kingdom consisting of six sections was enacted by the King and his Chiefs in Council on December 8, 1827 (*He olelo no ke kanawai*). Section VI read:

> This is the sixth; we forbid gambling (*pili waiwai*); The one who gambles shall be imprisoned in irons.

Shortly thereafter Ka'ahumanu reported to the missionaries that she was appointing judges to enforce the laws.

REAFFIRMATION OF THE PROHIBITION: 1829

The prohibition against gambling was reaffirmed by the King as part of his decision in the famous Cow Case of 1829.

> This...is my proclamation, which I make known to you, all people from foreign countries: - The laws of my country prohibit ...amusements on the Sabbath day, gambling and betting on the Sabbath day, and at all times. If any man shall transgress any of these laws he is liable to the penalty; the same for every foreigner, and for the people of these islands -- whoever shall violate these laws shall be punished.

A PERIOD OF STRUGGLE ABOUT "THE LAWS": 1830-35

However, the proclamation of a rule does not mean that it will be enforced and the years 1830 to 1835 were marked by a continuing struggle between the king and his followers and a substantial block of the chiefs, led by Kuakini and Kinau, the *Kuhina Nui*, over what the laws would be and how vigorously they would be enforced. The situation changed regularly. In April, 1831, Kuakini assumed the governorship of Oahu, rebuked his predecessor for not enforcing the laws, and announced that persons, including foreigners, who operated gambling houses would have their property seized and their houses burned (Chamberlain, April 1, 1831). In March, 1833, a crier for the king proclaimed the abrogation of all the old laws except those with respect to murder and theft; a member of the mission noted that although nothing specific was said about the Sabbath, "it has been predicted that the meeting house will be deserted" (Chamberlain, March 9, 1833). Shortly thereafter a major *ahaolelo* (council of the chiefs) was held which began a slow process of reconciliation among the chiefs. Things calmed a bit, but there is "more of sport, gambling and intemperance still remaining than has existed for many years" (Chamberlain, March 22, 1833). A *kapu* was placed on sports in the village of Honolulu, though allowed elsewhere, but gambling was not prohibited; "groups of natives are seen playing at *puu*" (Chamberlain, April 4, 1833). In August, 1833, Maui Governor Hoapili visited the king and an agreement was reached for consultations between the king and the chiefs concerning the laws (Chamberlain, August 31, 1833), Shortly thereafter a crier went through Honolulu proclaiming that "the laws are again in force" (Chamberlain, Sept. 2, 1833). Nevertheless, the struggle to dominate the king continued and it was only on January 1, 1835, that an *ahaolelo* committed the government of Oahu and the administration of the laws (*kanawai*) to Kinau. In July, 1835, it was announced that the chiefs were preparing to publish the new laws (Chamberlain, July 29, 1835).

GAMBLING OMITTED FROM THE NEW PENAL CODE: 1835

The new code of 1835 (*Olelo No Ka Kanawai O Ko Hawaii Nei Pae Aina Na Kauikeaouli Ke Alii*) contained five sections and it did not include any prohibition of gambling. This is consistent with the available statistical reports

of the Native Magistrates Courts in Honolulu for 1838 and 1839; there were no convictions for gambling reported (Schmitt, 1966:328). The king and chiefs had reached agreement upon an elaboration of the laws respecting homicide, plotting the death of the king, theft, adultery, fornication, prostitution, drunkenness (especially when it involved riotous behavior or property damage), and "deception." It seems clear, however, that the chiefs had not been able to reach any kind of agreement concerning gambling. It was not illegal.

However, if gambling in itself was not prohibited, the evidence suggests that winning at gambling by cheating was. The section on "deception," which included perjury and worshipping an idol, was aimed primarily at someone gaining the property of another by deceptive or fraudulent means, which included cheating at gambling. Thus there is a report of the following trial in January, 1841:

> ...A Native took the Chinamen's Schooner, because they owed him gambling money. It appeared on trial, that they had rolled nine pins. The Native had one of his boys with a string so contrived, when the Native rolled, as to haul all the pins down. He had to give up all his winnings and pay ten dollars fine. The boy who used the twine, ten dollars for lying. (Reynolds, Jan. 1, 1841)

PROHIBITION REINSTITUTED IN 1841

However, between the publication of the laws of 1835 and the case of deception just described, some important events had taken place in Hawaii. In response in part to threats from outside powers, the king and his chiefs had undertaken the study of "political economy" under the tutelage of Rev. William Richards, had promulgated a constitution for the kingdom, and established a legislature which added elected commoners to the council of chiefs. At the same time the occupation of New Zealand by the British in 1840 had resulted in a movement of many of the Pacific whalers from a wintering port there to wintering at Lahaina and Honolulu, with its attendant impact upon the economy and the numbers of foreigners in Hawaii.

From 1839 to 1842 the king and his chiefs and then his legislators were busily enacting statutes to cover a wide range of social relations and behaviors. They returned again to the question of gambling, and on May 11, 1841, established a law which clearly reflected the views of their missionary teachers and advisers.

The preamble or enabling clause of this 1841 "Law Respecting Gambling" (Kingdom, 1842: Ch. 29) gave the following reasons for the passage of the act:

> Whereas there are many people who neglect profitable business, which would be of advantage to themselves, their children and the country, and spend their time in employments which waste their property and do injury to their children, it therefore becomes the duty of the law to ward off these evils and seek to promote the greatest good....

The body of the statute consisted of three sections. The first section prohibited gambling and specified the fines, the second doubled the penalties for gambling on the Sabbath and the third dealt with gambling by children under the age of fourteen years.

> 1. If two persons gamble and one win of the other; if the sum be actually paid down before the face, they shall each pay a fine equal to the full amount of the wager. But if they merely make mention of property as a mere symbol, then they shall each pay a fine of five dollars. But if the property thus symbolically mentioned be very small, then the fine may be diminished in proportion to the value of the property spoken of.
>
> 2. If gambling be done on the Sabbath day then the fine shall be double what is mentioned in the first section.
>
> 3. If children below the age of fourteen years gamble, then the punishment shall be committed to the parents, but if they do not inflict any, then the law will be applicable.

PROSECUTIONS UNDER THE 1841 ACT

Clearly the mere passage of this act did not induce enthusiastic compliance among the population, and this appears to have been so especially among the foreign and Hawaiian elite. Thus only six months after its passage there was a publicized race between the horses of China John and Stupplebean. One observer reported, "John's won with ease. Many private side bets" (Reynolds, Oct. 16, 1841).

However, the very limited information available shows that there was some enforcement of the 1841 act. The translations of the minutebook of the District Court of Honolulu for 1844 include six cases (between April 29 and June 28) involving twenty persons (18 Hawaiians and 2 *haole*) in which gambling is part of the description of the case. One of these six is an assault case which arose when the *haole* loser in the bowling game refused to "buy the pitchers" for the winners. Of the sixteen persons specifically charged with gambling in five cases, seven in two cases were given small fines and there is no report of the outcome in the other three cases (Mookini, n.d.).

The available statistical materials report that there were a total of thirty-one convictions for gambling on Oahu in 1845, and that between April 1, 1846 and March 31, 1847, there were thirty-seven gambling convictions by Native District Judges in Honolulu, none by the Police Court of Honolulu, and a total of fifty-seven in the entire kingdom (3.8% of all convictions) (Schmitt, 1966: 329-331).

FEE SIMPLE OWNERSHIP OF LAND: 1846-49

However, the most significant and consequential event, or series of events, of the years 1846-1850 was the transformation of the legal system with respect to the rights or interests in land. By the end of the decade the prior system had been converted into one based upon the concept of alienable fee simple ownership. While the King and the former subordinate landlords were now the holders of a majority of the land, "the government" had also become the owner of about one-third, with the proviso that no alien could acquire land in fee simple. Of course, this also created the possibility that a person's land was a valuable which could be lost in gambling.

THE MASTER AND SERVANT ACT AND THE REMOVAL OF THE DISABILITY OF ALIENS TO OWN LAND IN FEE SIMPLE: 1850

Closely connected to this transformation of the land system were two additional statutes passed in 1850 as part of a program of economic development. Driven by the continuing decrease of the Native population, even predictions of its complete disappearance as a "pure race," the Master and Servant Act established the basis for the importation of term contract laborers. Another act removed the prior disability of aliens to acquire land in fee simple, thus initiating a process for the sale of the government land to aliens. The initial effort to import laborers was targeted upon laborers from China.

NEW GAMBLING PROVISIONS IN THE PENAL CODE OF 1850

The 1850 legislature also adopted a new penal code which had been produced by William Lee, then the Chief Judge of the Honolulu Superior Court of Law and Equity, who had also played a leading role in the other changes just

discussed. For the most part this *Penal Code of 1850* was a simplified version of a proposed penal code for Massachusetts (Phillips & Walcott, 1844). However, the proposed Massachusetts code did not contain any prohibition of gambling, and it is not clear whether Lee created "Chapter XL: Gaming" or if he drew upon an existing statute elsewhere.

Section 1 provided a general definition of gaming: "Whoever by playing at cards, or any other game, wins or loses any sum of money or thing of value is guilty of gaming."

Sections 2 to 4 established two degrees of gaming and provided the penalties for each. Gaming in the first degree was any gaming on "the Lord's day" or where the game involved winning or losing twenty-five dollars or more at one sitting or time (Sec. 2). The penalty was a fine up to ten times the value of the money or thing won or lost or imprisonment at hard labor up to sixty days (Sec. 3). All other gaming was in the second degree (sec. 2), with a penalty of a fine up to five times the value of the wager or imprisonment at hard labor up to thirty days (Sec. 4). These penalties were much greater than those of the 1841 act.

Section 5 provided that any losing player or side better "may sue for and recover the money or value of the thing so lost and paid or delivered, from the winner thereof," but Section 6 added that if the loser did not do so within three months, "it shall be lawful for any constable or other officer or person to sue for and recover, treble the value of such money or other thing, with full costs of suit, the one half of which shall go to the person so prosecuting, and the other half to the government, for the use of common schools. Section 8 provided that any person could be compelled to give testimony in a suit brought under Section 5, "but the testimony of any such person shall not be used against him in any suit or prosecution authorized by any of the [other] provisions" of the chapter.

Section 7 was an extraordinarily complicated section which clearly was motivated in part by the conversion of land interest into the alienable fee simple form. Its basic purpose was clearly summarized in the margin note of the 1869 edition of the penal code: "All notes, bills, conveyances of land, etc., tainted with gaming are void."

A CHINESE BUST UNDER THE NEW CODE: 1850

The new code took effect in September, 1850, and within one month *The Polynesian* (Oct. 5, 1850) announced the first major enforcement action to stop this "pernicious vice," the arrest of some Chinese men gambling at a table game,

probably *fan tan, pai kau* or *sup chai*, which were popular Chinese table games (Glick, 1980:145).

> GAMBLING.- Complaint having been made to the Sheriff that certain Chinamen were engaged in gambling, on Sunday last, he proceeded to the house and found them in the act, and took possession of the deposits upon the table, amounting we hear, to some $70 or $80. This, by the Penal Code, Chap. 40, is gaming in the first degree, and we hope to see it promptly punished accordingly. This is a vice of some pernicious a character, that it should be punished with the utmost rigor of the law; and all honest men will sustain the authorities in so punishing it. It is folly to talk about a man's liberty being restrained. So is a thief's and a murderer's, and who complains? The gambler is a corrupter of public morals. He takes his neighbor's money without an equivalent as much as a thief. He deprives a man of the ability to support those dependent upon him, and of paying his honest debts. Let the custom, then, never become fashionable in Honolulu, or respectable, even; for it is destructive of all confidence, and lends to irretrievable ruin, and often to suicide. (*Polynesian*, Oct. 5, 1850)

However, if these gamblers were convicted in the Honolulu Police Court, they were only fined and paid their fines immediately, for there is no entry for them in the "Record of Prisoners at the Fort" (Kingdom, 1850-63: October).

HAWAIIAN JUDGES CONVICT HAWAIIAN GAMBLERS: 1851-52

Moreover, the rhetoric of the editor in itself suggests that there was no consensus in the community regarding how vigorously the gaming statute should be enforced. The "Record of Prisoners," which appears at that time to serve as a general record of persons fined and/or imprisoned, shows eight gambling convictions in Honolulu in 1851 and eleven in 1852 (less than one percent of all 1852 convictions). Of these nineteen, four were convicted by Police Justices Bowlin and Harris and received fines ranging from fifty cents to five dollars. The remaining fifteen were convicted and sentenced by Justice Kaukai; four received fines of fifty dollars and eleven were sentenced to imprisonment at hard labor for one month. All nineteen of the persons convicted in Honolulu in 1851-52 were Hawaiian.

THE ARRIVAL OF CHINESE CONTRACT LABORERS

In 1852 two hundred and ninety-three Chinese male contract laborers from Amoy were added to the small Chinese community in Hawaii and through 1863 an additional 1,247 Chinese males, mostly contract laborers, along with fifty-four women and five children, came from China. Many members of the community were highly supportive of the initial arrivals (Lydon, 1975:22).

However, by the mid-1850's the general tone in the community had begun to shift. The Chinese were overwhelmingly single men and Hawaiian men resented the additional competition for Hawaiian woman. Many of Chinese immigrants came from districts near Macao and Hong Kong, where gambling, prostitution, and opium trafficking and smoking were major enterprises (Glick, 1980:144). As contracts expired and more of the Chinese men concentrated in Honolulu, their presence was seen as increasingly problematic by some of the authorities. Thus in January, 1856, John P. Griswold, the Police Justice of Honolulu, asserted:

> ....The position which the coolies hold among us -- half freemen, half slaves; their language intelligible to few; and their moral perversion unrestrained, save by fear of the penalty of law, render them a class of citizens for whom it is difficult to legislate. At home, ground under despotism, visited with cruel and sanguinary punishment for slight offenses, and devoid of culture and education, they possess a degree of cunning which it is hard to penetrate. (Quoted in Rep. of Chief Justice, 1856:13)

However, Griswold was primarily concerned with burglaries, especially burglaries to acquire opium, by the Chinese. He made no specific mention of gambling, even though in the same month he convicted ten Chinese men caught in a gambling raid and sentenced them to a fine of $15.00 plus $1.30 costs (Kingdom, "Record of Prisoners at the Fort, 1850-1863: Jan. 8, 1856). Moreover, the English language press made no report of this case.

The anticipation of the expiration in February, 1860, of "the last of the Coolie contracts" led Charles G. Hopkins, editor of *The Polynesian* (Dec. 3, 1859), to warn Honolulu of "a still further increase of liberated laborers from the plantations on the other islands, to swell the crowd of Chinamen already prowling about Honolulu without any apparent means of livelihood." This editorial was accompanied by a story of a crackdown on a Chinese gambling house.

> Chinese Hells,
>
> Or gambling-houses, have apparently become regular institutions and fixed facts here in Honolulu. Now and then the police succeeds in ferreting out and breaking up one or other of these schools for the gallows; but generally the difficulty of proving the gambling permits the escape of those implicated. On Thursday evening, however, Deputy Sheriff Jourdan, having received information of the whereabouts of one of these hells in Maunakea street, above Hotel street, went there with a strong force of constables and found some twenty-two or three Celestials deeply engaged in various games of gambling. At the unwelcome intrusion of Mr. Jourdan there ensued a rather ludicrous scene of confusion, as two-and-twenty Chinamen, not "all in a row," endeavored to escape through the doors, windows and partitions, and, like frightened pigs, with their tails erect, ran hither and thither, only to fall into the extended arms of the dreaded police. After a smart scramble for several minutes, during which some of the Chinamen hurt themselves by breaking out through the windows, eleven of the gamblers were persuaded to accept the invitation of Mr. Jourdan to spend the night at the Station and explain themselves next morning before Judge Davis.
>
> We rejoice in the capture of this villainous crew. For it is these gambling places which are the nurseries of burglaries, murders and arsons. But how to deal with a class of people, - living amongst and upon, but not with us, and governed by their own language, manners and morals, -- will rather exercise the ingenuity of the next legislature.
>
> Upon their trial at the Police Court, four Chinamen were convicted and fined $49 and costs, or imprisonment at hard labor until paid. The keeper of the house, another Chinaman, was sentenced to $13 and costs. (*Polynesian*, Dec. 3, 1859)

The next week the paper explained that the keeper of the house had received a lesser fine because it was his first offense and "his evidence was used as State's evidence, without which the others could not have been convicted" (*Polynesian*, Dec. 10, 1859).

CIVIL CODE OF 1859

The same year the legislature adopted a *Civil Code*, many provisions of which went back to legislation of the 1840's. Section 75 provided for a fine of

twenty-five dollars if any keeper of a hotel or victualing house "shall suffer any person, in or about the same, to practice gaming with any dice, cards, bowls, billiards, quoits, or other implements used in gaming," while Section 80 provided the same penalty for any keeper of a billiard table or bowling alley who "shall suffer the same to be used on Sunday, nor allow any gaming on such table or alley."

Table 1 Number of Gambling Convictions, Percent of All Convictions for Gambling, and Percent of Gambling Arrests Convicted in Hawaii for Two Year Periods, 1852-1899, and 1900

Year	Number of Convictions	% of All Convictions*	% of Arrest Convicted
1852-3	33	0.5	--
1854-5	29	0.3	--
1856-7	74	0.9	--
1858-9	56	0.8	--
1860-1	61	1.4	--
1862-3	38	1.7	--
1864-5	--	--	--
1866-7	35	1.0	56.5
1868-9	75	2.3	59.5
1870-1	135	3.5	64.9
1872-3	121	3.7	53.3
1874-5	218	6.1	94.0
1876-7	529	12.9	78.0
1878-9	564	9.9	81.5
1880-1	460	6.7	75.3
1882-3	407	5.2	79.8
1884-5	498	6.7	71.6
1886-7	434	6.6	56.3
1888-9	813	10.3	63.3
1890-1	775	13.9	61.1
1892-3	1195	17.6	63.0
1894-5	2358	27.5	43.2
1896-7	2868	27.7	69.0
1898-9	3419	30.8	78.5
1900	1747	24.0	84.6

* Because the biennial reports were inconsistent in whether or not Master and Servant Act cases were included among criminal offenses, they have been removed for any period in which they were so included.

Source: *Biennial Reports of the Chief Justice to the Legislature.*

MINIMAL ENFORCEMENT: 1850'S & 1860'S

Despite this sporadic enforcement and the tendency of the press to highlight the convictions of Chinese, it is clear from the data in Table 1 that the enforcement of the gaming laws was not a high priority in the 1850's and 1860's. For the bienniums 1852-53 through 1868-69 the total number of convictions in the entire Kingdom ranged from a low of 29 in 1854-55 to a high of 75 in 1868-69. Moreover, as shown in Table 2, the distributions of these small numbers among the different Judicial Circuits were highly variable from biennium to biennium.

Table 2 Percentage Distribution of Gambling Convictions by Circuit Court Districts*, 1852-1900

Year	Oahu	Maui	Hawaii	Kauai	Total
1852-3	48.5	0.0	33.3	18.2	100.0
1854-5	72.4	13.8	0.0	13.8	100.0
1856-7	51.3	17.6	2.7	28.4	100.0
1858-9	16.1	25.0	25.0	33.9	100.0
1860-1	14.7	19.7	11.5	54.1	100.0
1862-3	26.3	10.5	5.3	57.9	100.0
1864-5	--	--	--	--	--
1866-7	2.8	31.5	51.4	14.3	100.0
1868-9	1.3	33.3	64.0	1.4	100.0
1870-1	8.9	44.4	46.7	0.0	100.0
1872-3	7.4	26.5	52.9	13.2	100.0
1874-5	6.4	70.2	17.4	6.0	100.0
1876-7	18.9	51.6	19.5	10.0	100.0
1878-9	31.9	23.8	22.8	21.5	100.0
1880-1	21.1	16.5	37.8	24.6	100.0
1882-3	20.6	19.9	46.2	13.3	100.0
1884-5	20.0	35.2	41.4	3.4	100.0
1886-7	24.5	24.9	34.2	16.4	100.0
1888-9	28.8	27.3	34.7	9.2	100.0
1890-1	12.1	19.2	61.3	7.4	100.0
1892-3	20.2	23.6	40.8	16.4	100.0
1894-5	34.5	18.8	24.7	22.0	100.0
1896-7	27.6	26.2	16.0	30.2	100.0
1898-9	34.8	16.2	20.8	28.2	100.0
1900	43.7	17.7	18.5	20.1	100.0

* First Circuit - Oahu; Second Circuit - Maui, Molokai and Lanai; Third Circuit - Hawaii; Fourth Circuit - Kauai and Niihau.

Source: *Biennial Reports of the Chief Justice to the Legislature.*

A SINGLE PENALTY: 1870

However, it appears that the 1870 Legislature did recognize one difficulty with the 1850 "Gaming Act," in which gaming was in two degrees and the maximum fine for the more serious degree was contingent upon the amount of money won or lost. It now repealed sections 2, 3 and 4 of Chapter 39 of the *Penal Code* and replaced them with the following: "Whoever is guilty, shall be punished by fine, not exceeding One Hundred Dollars, and by imprisonment at hard labor, not exceeding sixty days" (Kingdom, 1870:Ch. 5).

MORE CHINESE LABORERS

The collapse of the whaling industry in Hawaii in the late 1860's and the expansion into sugar plantations in the 1870's again established a pressing need for additional imported labor and with considerable reluctance the government and the planters again turned to the Chinese. The number of Chinese, mostly single males, would jump from about 2,000 in the mid-1870's to about 18,000 in 1884, and most would spend their initial period working on plantations.

The initial build up of the Chinese was accompanied with increased convictions for gambling, from 121 in 1872-73 to 564 in 1878-79 (See Table 1). While there are no statistics by ethnicity for this period, the newspaper coverage indicates that the primary target was the Chinese. For example,

> GAMBLING. -- Thirty-nine Chinamen were arrested in one haul this week for gambling at Buffum's Hall. They were fined from $10 to $15 each, with two days hard labor, with the exception of the "bankers," who were fined from $50 to $100 and ten days each hard labor. The owner of the house was fined $200. (*Advertiser*, March 17, 1877)

> CHINESE GAMBLERS. -- A party of Chinese in a tenement on Nuuanu street commenced "a little game" on last Sunday evening, which became so interesting that it was continued until 2 o'clock in the morning, at which hour officer Dodd knocked at the window and requested "less noise;" whereat one of the players, probably conscience smitten, jerked away the cloth on which were the implements of the game and the stakes, while the rest of the gang made for the doors. Some got away, but five were arrested and bailed at the station-house for $10 each, which was forfeited by their non-appearance in the Police Court. (*Advertiser*, March 30, 1877)

> A RAID ON GAMBLERS. -- The raid made upon a Chinese gambling den on last Wednesday evening, and the capture of a number of those engaged, reflect credit upon the police force, and shows that they are awake to the live issues of the day. The Celestials were present in force as usual, and a further investigation in this particular direction would undoubtedly meet with like success. (*Advertiser*, May 31, 1879)

> GAMBLERS CAPTURED. -- A squad of police under the direction of Captains Bartholemew and McKeague, made a raid upon the Chinese Theatre, on Thursday evening, after the performance, and succeeded in capturing thirty-five Celestials who were engaged in gambling. A lot of opium was also captured, but the owners are unknown. This is a move in the right direction. (*Advertiser*, Feb. 21, 1880)

While all of these cases occurred in Honolulu, Chinese gamblers became increasingly active among the increasing numbers of Chinese laborers on the Neighbor Islands. Frank Damon, who was a missionary who worked among the Chinese, wrote the following about his visit to a plantation at Hanamaulu in 1882.

> Here we found quite a company of Chinamen. As we came into the main room of their house I was led to feel that to some at least we were not very welcome guests. There has arrived before us, one of those gambling "tramps", who earn an infamous livelihood by going around from plantation to plantation, leading the laborers to waste their hard earned wages in gambling. This vice seems to have a tremendous power over the Chinese. It is especially prevalent on the sugar plantations where the men are left to do pretty much as they wish, after they have left the field and mill.... We had the pleasure at Hanamaulu of breaking up an evenings sport. The men themselves seemed kind and received us pleasantly -- while the disappointed "Gambler" left us the field. (Damon, 1882:76, quoted in Glick, 1980:38-39)

THE CHINESE LOTTERIES

None of the above reports provides an indication of the kind of games which the Chinese gamblers were playing, but what evidence is available suggest that it is during this period, 1876 to 1884, that the Chinese lotteries became an important, if not the most important, component of gambling among the Chinese

-with the accompanying concern among those in authority who held a paternalistic attitude toward the Hawaiians that it would spread to the Hawaiians.

Two Chinese lottery games were popular: *pak kap pio* (*bark gup biu, pakapio*) and *chee fa* (*che fa*). *Pak kap pio*, translated as "white pigeon ticket" or the "dove lottery," was described as follows (*The King vs. Yeong Ting*, 6 Haw. 576):

> [In *Pak Kap Pio a*] cloth is hung up on which are tacked eighty small squares of paper, on each of which is written a Chinese character. Tickets are sold, having corresponding characters upon them. The holder of the ticket marks off on his ticket ten of such characters as he thinks may win. The manager, when all the holders of the tickets have completed their marking, takes down the papers from the cloth and rolls each one up in a ball so that the character on it cannot be read, mixes them up in a pan, then puts them promiscuously in four bowls, twenty in a bowl. The holders of tickets select and withdraw one bowl and contents. Sixty characters then remain. The manager then selects one bowl, and its contents, twenty characters, are the winning numbers. These are tacked on to the cloth and again hung up, and holders of tickets having characters on them which they have marked off, corresponding to the characters exhibited on the cloth, are winners, according to the number of characters so marked off. To illustrate: In the cheapest class of these lotteries, the one cent game, if a man pays ten cents he is entitled to mark ten numbers.
>
> If he marks 6 of the winning numbers he wins .. $ 1.50.
> If he marks 7 " " " " .. 15.00.
> If he marks 8 " " " " .. 75.00.
> If he marks 9 " " " " .. 150.00.
> If he marks all or 10 " " " .. 300.00.
>
> A record is kept showing the number of tickets sold, to whom, and the amounts received.

Drawing upon several sources (*The Queen vs. Jim Kaka*, 8 Haw. 305; Chun, 1983:23), the *Chee Fa* lottery was operated as follows:

> *Chee fa* was a name or phrase game. The principals or bankers propounded a riddle and a list of thirty-six words (poetic phrases or names of two characters), one of which was the winner. A player was shown the riddle and he then marked or "dotted" his choice or choices among the thirty-six on "the ticket." Thus, for ten cents a player might mark one name or phrase at ten cents of two at five cents each. The payoff was thirty to one: three dollars for a ten cents winner. At a designated time the bankers opened a selected envelope and announced the winner.

Chinatown in Honolulu now became the center for a network of gambling operations which spread throughout the islands. The "banks" of the lotteries were typically in Chinatown, along with certain stores which handled tickets and bets. But in addition agents or "runners" for these banks were operating on all the islands (Glick, 1980:145). Hawaiians were increasingly identified as lower echelon agents and as players of the lotteries.

THE JAPANESE GOVERNMENT'S CONCERN WITH "THE CHINESE PROBLEM"

By the early 1880's the "Chinese problems" -- opium and gambling, especially the lotteries -- had convinced many in the government of Hawaii that a different source of plantation laborers had to be found. The favorite candidate was Japan, a choice facilitated by the belief among some of the Hawaiian elite that the Japanese were a "cognate people" and "much like us," especially in their industriousness and their opposition to opium.

However, the negotiations to bring Japanese contract workers were made more complicated by the presence in Hawaii of the large number of Chinese. The Japanese government insisted that the Japanese workers would be kept separate from the Chinese and that the government of Hawaii would begin a systematic program to halt further immigration by the Chinese and to reduce the numbers of Chinese already in the Kingdom (Kuykendall, 1967:ch. 6).

The government intensified its efforts to control gambling, with a special focus upon the Chinese lotteries, and the number of convictions for gambling in 1884-85 was almost 25 percent higher than in the previous biennium (see Table 1).

In February, 1885, the first company of Japanese laborers arrived at Honolulu.

IS A LOTTERY A VIOLATION OF THE "GAMING" STATUTE?

The intensified public pressure, led by the editor of The *Pacific Commercial Advertiser*, on the police to shut down the gambling dens and lotteries now led the lottery operators to initiate a legal challenge to their prosecution. In 1885 Yeong Ting was convicted in the Honolulu Police Court under the gaming statute for being the manager of a *Pak Kap Pio* operation. He then appealed for a trial *de novo* to the Intermediary Court, a court consisting of one of the Supreme Court Justices in chambers (sitting alone without a jury) (*The King vs. Yeong Ting*, Intermediary Court No. 467, Archives of Hawaii).

In July the case came before Chief Justice Alfred Judd. The government was represented by Attorney General Paul Neumann, who had come to the Kingdom from California in late 1883, become a denizen of the Kingdom and been appointed Attorney General on December 14, 1883. He was widely recognized to be a "Spreckels' man." Yeong Ting was represented by Alfred S. Hartwell and William A. Whiting. At the outset the defense demurred to the charge.

> It is urged by the defendant's counsel that this is a lottery, a device by which by a simple chance a man may win something, and that it is not within the "Gaming Act" of this country, although its evils may be within the evils sought to be prevented by the Act. If one takes a chance in a raffle or a lottery he plays no "game." (6 Haw. 576, 577)

Justice Judd noted that it was "remarkable" that in thirty-five years section one of the "Gaming Act" declaring, "Whoever by playing cards or any other game wins or loses any sum of money or thing of value is guilty of gaming," had "never received judicial construction."

Examining various authorities, Judd noted that Bishop's *Statutory Crimes*, Sec 857, stated: "A contest of chance or of skill disconnected from the idea of useful production, wherein the party in whose favor the result appears is termed the winner, and the other party is termed the loser."

Taking note that some persons distinguished between games of skill, games of chance, and games which mixed chance and skill, Judd found *Pak Kap Pio* to be a "game of chance," but held that this made no difference: "Our statute is silent as to whether the game, to be within the law, shall be one of skill, of chance, or of both..."

Since the playing of games was not gaming unless money was won or lost, Judd then found that there was sufficient evidence that Yeong Ting was the manager, that "the chances of his winning money were exceedingly great" and that "he did win money by this game."

One question remained: Did Yeong Ting "play at the game?" Here Judd wrote:

> ....He conducted the lottery and had an interest in its almost certain gains. But I do not think it necessary to hold that he must be shown to have personally manipulated the apparatus or devices used, in order to hold him a player of this game. He must be shown to have participated in it so far as to have risked money or a thing of value upon the contingency of success or loss. Our statute does not particularize the games which are unlawful, as in some countries. I must believe that the Legislature did not enumerate the games then in vogue, in order that the law might be comprehensive enough to include every description of game, which, if played for money, the law condemns. Human ingenuity is constantly inventing new games and new names for old games. But under our sweeping law it is not necessary that there should be new legislation to meet each new invention. The test is whether the player wins or loses money thereat.

In reaching this last conclusion, Judd took special note of the decision of the Supreme Court of Massachusetts wherein it had considered the question whether the game known as "the policy or envelope game" was a lottery. There the court had found it to be a "lottery" and "a game," and that the "playing" of it was "by a person choosing a number and playing for it, and the rest of the game was executed by the conductor of the lottery" (*Commonwealth vs. Wright*, 137 Mass. 250).

Chief Justice Judd then found Yeong Ting guilty and sentenced him to pay a fine of $100 plus costs and to be imprisoned at hard labor for ten days.

Yeong Ting did not appeal further to the Supreme Court *en banc* for a review of the Chief Justice's decision in the Intermediary Court. Although the case was determined in July, 1885, it would not be published in the *Hawaii Reports* (6 Haw 576) until 1887. It was also not a binding decision upon the Circuit Courts of the other islands.

Thus it should have been no surprise when the question was raised in the Supreme Court in the January term, 1886, in the case of *The King vs. Ah Lee and Ah Fu* (5 Haw. 545; Supreme Court Criminal Case No. 1132, Archives of Hawaii; Second Circuit Criminal Case No 174, Archives of Hawaii). In December, 1885, Ah Lee and Ah Fu were convicted of gaming in the Circuit Court at Lahaina, Maui. Aki testified that on October 26 he gave money to Ah Mau for a lottery ticket and later received the ticket produced as evidence in the court. Ah Mau testified that he bought the ticket for $2.95 from Ah Fu, who gave the money to Ah Lee, who then gave the ticket to Ah Fu, who gave the ticket to Ah Mau, who gave it to Aki. Aki testified that later he presented the ticket to Ah Lee and was told that he "had not drawn anything." On October 29 Deputy Sheriff H. G. Treadway, with a search warrant, entered the premises of the defendants at Wailuku and seized money, record books, stamps, lottery tickets and other lottery apparatus. Ah Lee denied all the allegations and asserted that he did not know either Aki or Ah Mau. Ah Fu did not testify but it was stipulated that his testimony would be the same as Ah Lee's. The jury found the defendants guilty.

Before the Supreme Court (Chief Justice Judd and Associate Justices McCully and Preston) the crown was represented by Attorney General Neumann, while the defendants were represented by Clarence and Volney Ashford, who had excepted to the verdict as "against the law and contrary to the evidence." On the questions of evidence the Supreme Court found that in this instance it was "entirely a question for the jury as to whether they believed the defendants or the witnesses for the prosecution." On the argument that the verdict was against the law, the decision, written by Justice Preston and issued March 2, 1886, simply asserted, "A lottery is a game within the meaning of [Section 1 of the Gaming Act]."

A NEW STATUTE AIMED AT THE LOTTERIES: CH. 41, 1886

However, if Chief Justice Judd was correct that the legislature has been wise to keep the gaming act very broad rather than to engage in specifying every activity which constituted gaming, it was clear in 1886 that the lottery operators were increasingly appearing with sharp legal counsel in the lower courts and appealing for jury trials when convicted in the lower courts. The number of arrests had increased, but the conviction rate had declined.

Moreover, only a little over a month after the Supreme Court had issued its decision in the case of Ah Lee and Ah Fu, Honolulu was devastated by a fire, the origin of which was believed to be a Chinese gambler. According to Chung Kum Ai, a successful Chinese businessman who headed the United Chinese Society from 1901 to 1906,

> The Great Fire of April 16, 1886, a Sunday, started at three in the afternoon....
>
> The fire had been started very carelessly. A Chinese gambler who loved his bark-gup-biu (picking the right combination of words from a printed list) had purchased a pair of candles to burn at the altar of the Goddess of Chance. He was careless in handling the candles. They set the altar curtains on fire, and in no time the conflagration had spread to other parts of Chinatown, from the lower part of Beretania down Nuuanu to River and King Streets....

In the fall of 1886 the Legislative Assembly moved to provide legislation that would be supplementary to the Gaming Act with a clear purpose of making it easier to arrest and convict any person who in any way was associated with a Chinese lottery. The statute, approved October 15, 1886, was entitled, "An Act Supplementary of Chapter XXXIX of the Penal Code Relating to Gambling," and became known simply as "Chapter 41 of 1886." For the purposes of this article, the most significant portions were Section 3 and 5.

> Section 3: Any person who shall establish, commence or be a partner in any lottery or in any scheme by which prizes, whether of money or of any other matter or thing are gained, drawn for, thrown or competed for by lot, dice or any other mode of chance, or who shall sell or dispose of, or purchase or have in possession, any ticket or other means by which permission or authority is gained or given to any person to throw for, compete or have any interest in any such lottery or scheme, and any person who shall manage or conduct or assist in managing or conducting any such lottery or scheme shall for every offense forfeit and pay a sum not exceeding five hundred dollars, and for any second offense, besides such penalty shall be liable to imprisonment with or without hard labor for any term not exceeding six months.
>
> Section 5: Any person who shall have unlawfully in his possession any tool, device, implement or ticket used or which can be used for the drawing, carrying on or playing at any lottery, game of faro, monte, roulette, lansquenet, rouge et noire or any other banking game played with cards, dice or any device shall be punishable by a fine not exceeding five hundred dollars for the first offense, and for every subsequent offense by a fine not exceeding five hundred dollars and imprisonment with or

without hard labor not exceeding three months, and such tool, device implement or ticket shall be forfeited and destroyed.

It was now quite clear that the establishment, banking, conducting, managing or assisting of a lottery was prohibited. Moreover, the possession of any item associated with the operation or playing of a lottery, including the possession of simply one ticket was prohibited. A first offender could be fined up to $500. A second offender in the first category could receive an additional imprisonment up to six months, while those in the second additional imprisonment up to three months.

As shown in Table 1, the passage of this act was followed by sharp increases in the numbers of persons arrested and convicted of gambling. Comparing the period 1886-87 with 1888-89, arrests increased from 771 to 1,285 and convictions from 434 to 813, while as shown in Table 3 the percentage of persons convicted who were Chinese increased from 59.2 to 65.2.

THE "BAYONET CONSTITUTION" OF 1887

The armed uprising in 1887 by the *haole* establishment in reaction to certain policies and practices of King Kalakaua and his Prime Minister, Walter Murray Gibson, resulted in the adoption of a new constitution by the king which greatly restricted suffrage, made the House of Nobles elective, reduced the power of the king and put the cabinet under the control of the legislature, provided for new elections and assured that the Reform Party would control the cabinet. This meant that it was most unlikely that there would be any major change in government policy with respect to gambling and especially the Chinese lottery.

THE PROBLEM OF POLICE CORRUPTION

However, the "successes" in the "war on gambling" were not achieved without problems. Increasing numbers of defendants appealed for jury trials and the jurors, *haole* or Native Hawaiian, were reluctant to convict in gambling cases (Nelligan and Ball, 1992: Table 2). Second, a number of cases taken to the Supreme Court indicate that the police and prosecutors sometimes became confused concerning how the charges should be specified when considering both Chapter 39 of the *Penal Code* and Chapter 41 of 1886 (*In re Ah Hook and Chock Hin*, 6 Haw. 664; The King vs. Lum Hung, 7 Haw. 344).

Especially important at this time were the allegations which circulated through the community of a widespread practice of the Chinese gamblers bribing

Table 3 Percent Distributions of Gambling Convictions by Circuit and Ethnicity, 1886-1900

Year		Chinese	Japanese	Hawaiian	Portuguese	Other	%Among Circuit
1886-7		59.2	0.7	31.6	0.9	7.6	100.0
	Oahu	55.7	0.0	26.4	3.8	14.1	24.5
	Maui	75.0	0.0	19.4	0.0	5.6	24.9
	Hawaii	45.9	0.0	51.4	0.0	2.0	34.2
	Kauai	66.2	4.2	16.9	0.0	12.7	16.4
1888-9		65.2	12.8	19.9	0.2	0.6	100.0
	Oahu	96.2	0.8	3.0	0.0	0.0	28.8
	Maui	68.9	24.8	5.4	0.4	0.4	27.3
	Hawaii	35.4	15.9	47.2	0.3	1.0	34.7
	Kauai	80.0	2.7	16.0	0.0	1.3	9.2
1890-1		33.3	40.2	24.3	0.2	1.8	100.0
	Oahu	60.6	6.4	28.7	0.0	4.2	12.1
	Maui	34.2	46.6	13.0	1.4	4.8	19.2
	Hawaii	27.6	43.4	28.4	0.0	0.6	61.3
	Kauai	35.1	57.9	7.0	0.0	0.0	7.4
1892-3		28.7	54.9	13.7	1.8	0.8	100.0
	Oahu	62.8	9.9	26.4	0.8	0.0	20.2
	Maui	24.8	61.0	9.9	0.7	3.5	23.6
	Hawaii	15.8	73.8	6.4	4.1	0.0	40.8
	Kauai	27.9	54.8	17.2	0.0	0.0	16.4
1894-5		49.1	39.9	9.2	0.5	1.2	100.0
	Oahu	75.7	12.5	4.0	0.0	1.0	34.5
	Maui	47.6	33.9	14.7	0.4	3.2	18.8
	Hawaii	15.5	75.1	7.6	1.2	0.7	24.7
	Kauai	46.2	48.5	4.0	0.6	0.6	22.0
1896-7		55.0	33.8	9.0	0.4	1.5	100.0
	Oahu	71.5	11.4	12.9	0.9	3.4	27.6
	Maui	48.1	42.5	8.6	0.1	0.7	26.2
	Hawaii	56.1	35.1	7.2	0.6	0.9	16.0
	Kauai	46.0	46.2	6.7	0.0	0.9	30.2
1898-9		61.3	24.7	12.5	0.5	0.9	100.0
	Oahu	69.8	3.4	23.7	0.9	2.0	34.8
	Maui	74.1	15.8	10.1	0.0	0.0	16.2
	Hawaii	49.5	39.2	9.0	1.0	1.0	20.8
	Kauai	52.2	45.0	2.8	0.0	0.0	28.2
1900		54.2	30.8	12.6	1.3	1.0	100.0
	Oahu	62.8	14.5	17.8	2.7	2.1	43.7
	Maui	64.1	23.6	12.2	0.0	0.0	17.7
	Hawaii	39.6	49.2	7.4	1.8	1.8	18.5
	Kauai	39.8	55.4	4.5	0.0	0.0	20.1

Source: *Biennial Reports of the Chief Justice to the Legislature.*

the police. While Chung Kum Ai is not entirely correct about his dates, his overall assessment of the situation is probably accurate.

> It was gambling then that had caused the Great Fire of 1886, and gambling was one of the great evils that cursed the Chinatown of that day, the other being opium-smoking. At one time the Hawaiian Government did nothing against these two evils, reasoning foolishly perhaps, that inasmuch as it affected only Chinatown and the Chinese there, the Government should not interfere with what the Chinese themselves did, even if they were headed straight for privation and damnation....In 1883 [sic], however, the Hawaiian Government legislated against gambling and opium-smoking. King Kalakaua appointed John H. Soper, Marshal of the Kingdom, with definite instructions to clean up Chinatown of its gambling and opium-smoking. Soper took his responsibilities seriously. He went out personally to make arrests. Chinatown gamblers and opium-smokers hated Soper worse than poison, for when Soper was present at the raids, his subordinates did not dare accept bribes....He once told me a story that was typical of the man. He was passing along King Street one day when a well-known gambler pulled him into his office and gave him five hundred dollars. Soper took the money, returned to his office immediately, told his story and handed the five hundred dollars to his superior. His superior kept the money, did nothing about the bribery charge, never mentioned the money again.... (Chung, 1960:97-98)

Soper did serve as Marshal of the Kingdom twice, 1884 to 1886 and 1888 to 1890, and it was during this second period that Honolulu did witness the much intensified police crackdown on Chinese gambling described above. Comparing 1886-87 with 1888-89, we see in Table 3 that the percentage of the convictions which took place on Oahu increased from 24.5 to 28.8 percent, but even more significantly the percentage of those convicted on Oahu who were Chinese increased from 55.7 percent to 96.2 percent.

WHY ONLY THE CHINESE?

This last development led the editor of the *Advertiser*, a newspaper which now spoke for the leading businessmen, to raise some questions about the enforcement policy of the police (May 19, 1888). In a general editorial aimed at the "practice of living beyond one's income," he commented upon the role of gambling, said to be second only to "easy credit" in producing this practice.

> ....A great deal of it is also to be accounted for by the prevalence of gambling, especially among young men. Gambling among Chinese is put down by the strong arm of the law whenever an opportunity arises, but it very rarely happens that gamblers of other nationalities are interfered with by the police. This is to be regretted not only in the interest of society, but the offenders themselves, for in this way a general looseness as regards monetary obligations is generated, culminating in some cases in actual criminality. The latter is rarely developed in an individual otherwise than gradually, and causes tending to promote it might often be removed. Prevention is better than cure, and the removal of temptation is one of the best means of prevention.... (*Advertiser*, May 19, 1888)

A week later "S" wrote a letter to the paper which endorsed the general position of the editor, but also went beyond him to protest the manner in which the enforcement practices also constituted serious violations of the civil rights of the Chinese.

> Police Court reports that there is considerable gambling going on in Honolulu, and strange to say it seems to be nearly all, if not all amongst the Chinese; in all other countries, if we are to believe the newspaper reports, other people gamble; here it is otherwise and we ought to be very grateful. Gambling is a vice that leads to others, and how ever much or little of it may be done in what is known as "social play" has a tendency to that which is bad, and never to that which is good.
>
> "Rumor," if she could be believed, asserts that there is gambling and social gambling going on in Honolulu amongst others than Chinese; carried on in private houses as well as public houses, and that the police would have no more if as much trouble to find it as they have with the Chinese. Some entertain the idea that the police have no right to enter private premises-that is family residences, to look for such. The police, however, do not think so, for they do enter a Chinaman's castle day or night by front door, back door or any other way, and sometimes find a ticket that has or is supposed to have a gambling air about it, or find some at the game of backgammon with "chips" on the table. This is called a raid and the Chinamen and the chips are carried away and fined fifteen dollars or thirty days. This may be according to law and right, but if so why overlook other respectable nationalities.

> If done as now for the few dollars fine and the little credit attached to it, would it not be better and just to fly higher, get bigger game and bigger credit.
>
> It seems to me, and I have reasons to know that it does many others, that this idea of pouncing on a few poor Chinese who are amusing themselves quietly in their own house should be let alone unless all are to be served alike. (*Advertiser*, May 25, 1888).

JAPANESE LABORERS AND GAMBLING

As noted above the first company of Japanese laborers arrived at Honolulu in 1885 and their population would increase to include at least 10,000 adult males by the end of the decade. Most of these Japanese were sent to the outer islands to work on the plantations, where they also developed a plantation gambling lifestyle similar to that of the Chinese. Gambling took place practically every pay day when a professional class of gamblers would infiltrate into the camps and set up games for all who wanted to play (Miyamoto, 1964:151). Most of these games were of the dice variety and *Cho-han* or 7-11 were the most common.

However, these professional gamblers were not privileged to operate unless appropriate payoffs were made to *yakuza* leaders who had begun arriving with the first Japanese laborers and who had other *yakuza* and retired sumo wrestlers for their bodyguards and enforcers. Kazuo Miyamoto, whose parents worked in the area, has provided a description of the organization as it existed on Hawaii in the 1890's. He stresses that in this portion of his book, "The characters are composites and thus resemble no one in particular" (Miyamoto, 1964:9), but there is no reason to doubt the general depiction he presents.

> There were quite a few lodgers at the hotel. These had been domiciled in Hawaii for some years and were men who detested work and chose to live by using their wits and nimble fingers. This parasitic class was considerable in number and even the remotest plantations were not overlooked in their systematic scheme of exploitation. On pay days they would swarm to the plantations and gather in the silvers from the laborers. There was a famous gangleader in Hilo, Funakoshi Tatsugoro by name, who had twenty or more henchmen to do the business in the different plantations on the Hamakua coast. The island of Hawaii was divided up into different spheres of interest among the gang leaders and gambling games could not be held unless sponsored by this gangster.
>
> On the afternoon of the monthly pay day, in order not to be caught by the manager, the gamblers infiltrated into the camps by twos and threes. Wada was a representative of the gang at Waipunalei and towards evening, would open the game in his bunk and see to its orderly conduct. He was a gambler from Japan, and to attest to his former exploits his body was covered by a tattooed dragon. He was from Kobe and there was a rumor that he escaped capture by the police after a murder case in which suspicion was directed his way. He had a year more of his contract to serve.
>
> On the matted floor, the players sat cross-legged in a circle. Two dice were placed in a smooth tea cup without a handle, and after jiggling, the cup was placed face down on the floor. The dice were thus covered and betting followed. The winner was the one who guessed the sum total of the face of the dice. The game was fast and stakes could reach enormous figures. Wada had a wooden box which was padlocked and had a hole big enough to admit a silver dollar. This was the "kitty" and went to Funakoshi of Hilo, a tribute he exacted from the sporting elements of plantation workers. Such games might continue for several nights on a plantation and the intervening idle days between pay days in different plantations were spent by professionals at a neutral zone such as Laupahoehoe or Hilo, where they lived peacefully in hotels away from the capitalistic scrutiny of plantation policeman. (Miyamoto, 1964:122).

However, this pattern had already become firmly established by the end of the 1880's. In May, 1889, Soryu Kagahi, a Buddhist priest recently arrived from Japan, visited the camps on the east coast of Hawaii.

> ....He went from plantation to plantation comforting his countrymen who were under "heavy burdens both in the physical and spiritual [and who were] distressing and wandering, as sheep not having a shepherd." To his great dismay, the Buddhist priest discovered that the Japanese, who had expected to accumulate money fast and return to Japan, had in fact accumulated very little money and a great deal of bad karma. Gambling had become such a prevailing vice among the Japanese that many would have "no funds at the expiration of their

contracts, to return to their homes, if they [paid] their gambling debts.... (Hunter, 1971:42-43).

MODIFICATION OF THE SENTENCING PROVISION OF "THE GAMING ACT"

If the target of the gambling enforcers on Oahu was almost exclusively the Chinese, this new development on the plantations on the other islands now made the Japanese gamblers a target of the law enforcers there. In 1886-87 no Japanese were convicted of gambling on Oahu, Maui and Hawaii, and they constituted only 4.2 percent of the convictions on Kauai. However, in 1888-89 their percentages increased to 24.8 percent on Maui and 15.9 percent on Hawaii (Table 3).

Most of these convictions were under the general "Gaming Statute," Chapter 39 of the *Penal Code*. As noted above that statute had been amended in 1870 to provide for a sentence of fine and imprisonment. However, plantation managers were not interested in having their laborers in jail. In 1890 the Legislature amended the sentencing provision of Chapter 39 to read: "Whoever is guilty of gaming shall be punished by fine, not exceeding One Hundred Dollars *or* by imprisonment at hard labor not exceeding sixty days" (italics added) (Kingdom, 1890, Chap. 41).

As shown in Table 3, the biennium of 1890-91 was the first period in which some group other than the Chinese constituted the largest percentage of those convicted of gambling and this group was the Japanese, who made up 40.2 percent of those convicted in the Kingdom, 46.6 percent on Maui, 43.4 percent on Hawaii and 57.9 percent on Kauai. This general situation was even more pronounced in 1892-93, when 54.9 percent of those convicted of gambling were Japanese, being 61.0 percent on Maui, 73.8 percent on Hawaii and 54.8 percent on Kauai.

However, the overall surpassing of the Chinese by the Japanese was due in no small part to a dramatic decline in the number of convictions for gambling on Oahu, where the Chinese still constituted about 60 percent of those convicted (see Table 3), with a resultant decline in the total for all islands combined (see Table 1). In 1890-91 the number of convictions on Oahu had fallen to 94 from 234 in 1888-89 and there were only 65 convictions in 1892.

QUEEN LILIUOKALANI'S MARSHAL: CHARLES B. WILSON

The anti-gambling faction attributed this situation to the deliberate inaction or incompetence of the Marshal of the Kingdom, Charles B. Wilson,

regarding the enforcement of both the gambling and opium laws. Wilson, of British and Tahitian ancestry, had been appointed by Queen Liliuokalani very shortly after she succeeded King Kalakaua in January, 1891. Wilson followed Charles L. Hopkins, who had served about one year following the second stint of Soper as Marshal. Wilson's performance was widely criticized by both the *haole* establishment and Hawaiian leaders, but the Queen was insistent through numerous cabinet changes that he remain in office. In August, 1892, Marshal Wilson published a letter in which he defended his record regarding gambling arrests and convictions, asserting that his record was as good as his predecessor. However, this was quickly turned against him by the opposition press. *The Advertiser* (Sept. 2, 1892) editorialized:

....Assuming that the figures given are correct, which, after all, is a wild assumption, they condemn the Marshal hopelessly, for they show that he has made no more arrests than his predecessor. As gambling is ten times as common as it was then he ought to have made ten times more arrests.... (*Advertiser*, Sept. 2, 1892)

THE "LOUISIANA LOTTERY BILL": 1892-93

This was the general situation when persons arrived in Honolulu to promote what was in effect the movement of "The Louisiana Lottery" to the Kingdom. This lottery had been operating out of New Orleans for over two decades. It made use of the mails to extend its scope of operations throughout the United States. At this time the United States government had taken action to prohibit the use of the mail service by the lottery and its operators were seeking a new home. According to Kuykendall (1967:544-5):

> ....It is not known when the promoters of the project came from the United States and began to work in Hawaii, but early in June [1892] the scheme was presented to Queen Liliuokalani and won her firm support. It is a curious story unfolded in the pages of her dairy. In this period the Queen was studying German; her instructor was a Miss Wolf, who was also a medium who read "messages" in cards and brought to her royal pupil fascinating "revelations" from the spirit world about the noble European ancestry of the late Prince Consort John O Dominis and about other matters of more immediate and mundane interest, including advice on cabinet appointments. In the early morning hours of July 8...Miss Wolf came with her cards to the queen and told her that at ten o'clock a gentleman would call on her with a "bundle of papers where it would bring lots of money across the waters. She says I must have the House

[legislature] accept it -- it would bring 1,000,000 [sic]." Sure enough, the man came, a Mr. T.E.E, and at this time and in later visits, always foretold by Miss Wolf, he explained the lottery project, gained the queen's support for it, and discussed with her the problem of getting it accepted by the legislature.

It is clear that the queen looked upon a lottery franchise as a means whereby the government would obtain revenue -- half a million dollars a year -- for public works, immigration, and other objects; she thought it would free the government from its too frequent dependence on the local banks for temporary loans; she either did not know about, did not believe, or deliberately disregarded the...objections to such an enterprise as a legalized lottery. One of the messages relayed to her by the medium (August 16) was that as long as the lottery continued in operation she would receive $10,000 or $15,000 a year "for pocket money" from the head of the company.... (Kuykendall, 1967:544)

On August 30 Representative William White of Maui introduced "An Act Granting a Franchise to Establish and Maintain a Lottery."

[The bill would] grant to a group of five men, including three Honolulu residents, an exclusive franchise to establish and maintain a lottery for a period of twenty-five years. The grantees would be required to pay to the government $500,000 each year, this sum to be used to subsidize the laying of an ocean cable to the American coast and the construction of a railroad around Oahu and one along the Hilo-Hamakua coast of Hawaii, and for harbor improvements, roads and bridges, and encouragement of industries, tourist travel, and immigration.... (Kuykendall, 1967:550-1)

The promoters initiated a newspaper-brochure, *The Golden Era*, to carry their arguments to the public, but no one could find out who Mr. T.E.E was.[2]

Immediately the opposition organized their counterattack. A number of public meetings were called at which resolutions in opposition to the bill were presented, discussed, passed and converted into signed petitions to be presented to the legislature. Typical of these was one called by the Young Men's Christian Association (Y.M.C.A.) and reported extensively by *The Advertiser* (Sept. 5, 1892). The resolution opposed the bill on numerous grounds: moral ("contrary to the laws of God and mankind"), social (it would bring undesirables to the

Kingdom), political (the gamblers would control the Kingdom) and commercial (contrary to genuine economic development).

However, several of the comments by supporters of the resolution are particularly significant. President Hosmer of Oahu College said, "We place it in the same category as the saloon." H.P. Baldwin noted, "We have only to look on the game of che fa for its results." Rev. S.E.Bishop asked, "Are we going to do something which will bring the anger of the United States upon us?" Finally W. O. Smith warned, "If this thing gets hold of us here, we can't get it off except by revolution and foreign interference."

Newspaper notices appeared advising persons where they might sign petitions in opposition to the bill, such as the offices of W.G. Irwin and Co., Theo H. Davies and Co. and Lewers and Cooke (*Advertiser*, Sept. 6, 1892). Petitions were also submitted by numerous women's organizations, including Hawaiian woman and Portuguese women.

At least one of the comments to the newspapers took the form of a poem by J.B. entitled, "When the Lottery Comes" (*Advertiser*, Sept. 7, 1892).

The little tin gods with little tin mills
Will all troop over the eastern hills,
To grind out cash to pay our bills,
And give McKinley congestive chills,
When the lottery comes.

All on the move, with cash machines,
Old plug uglies from New Orleans,
Hard-favored Yankees filled with beans -
And they'll be Hawaii's kings and queens -
When the lottery comes.

The heavenly fellows 'll come in swarms,
And gobble our city and gobble our farms,
And all wear diamonds and big gold charms;
And the Fort Street folks will buy burglar alarms -
When the lottery comes.

The planters 'll then feel capital's claw,
And Christians, the weight of the devil's paw;
No use for morals, or love or law,
For the race 'll wind up with a big hurrah,
When the lottery comes.

The extant petitions to the legislature currently in the Hawaii State Archives number fifty-five, with fifty-three in opposition and two in favor of the lottery bill. But in addition there is a handwritten letter, dated Sept. 20, addressed directly to the queen and signed by Juliette Cooke and the other members of "We the Women."

> To her majesty Liliuokalani, by the grace of God queen of the Hawaiian islands.
>
> Your Majesty, In the view of the fact that a bill has been brought before the legislature asking a franchise for an international lottery company,and if such bill pass the assembly it must come before our majesty for signature, we, loyal subjects of your majesty, and residents of this fair land, beg to submit to your consideration a few reasons why, in our estimation, the nation would suffer were such a bill become law.
>
> We esteem your majesty as one who loves her people and earnestly desires the nation's prosperity. We believe that you are jealous of the nation's integrity, and feel a pride in the fact that, though one of the least of the nations of the earth, she is regarded by all with respect. Strong in this belief, we are made bold to come before your majesty with our plea, knowing that the promoters of this scheme will spare no pains to press their arguments, and feeling sure that your majesty, as a fair minded woman, will wish to look at the question from all sides, that you may be better able to decide wisely if the bill shall be brought before you for decision.
>
> First. We beg your majesty to call to mind the terrible struggle through which the great state of Louisiana has just passed. Twenty five-years ago, under the pressure of a financial depression far greater than that of Hawaii nei at present, this state granted a franchise to the Louisiana Lottery Company. It was argued that large sums of money would be brought into the state, and thus business would be increased. What has been the result? After twenty-five years of experience, it is found that the men who have been enriched are the exceptions, while those who have been impoverished are a great host. Business has been demoralized, and gamblers and sharkers have come into the state to the exclusion of a more desirable class of citizens. No age sex or condition is respected, but men, women, and little children have been swept into this maelstrom and destroyed.

> Now this great commonwealth, with a population of more than nine-hundred thousand, finds she is powerless to force herself from this gigantic evil and calls for aid upon the whole unions of states. Can we reasonably hope that such an influence will be any better for Hawaii? And if we in spite of this example, open our doors to this evil, where can we look for help when the burden becomes too heavy for us to bear. If under our restrictive laws, so many of our people are already given over to gambling, how many will escape when we have covered it with a mantle of respectability by granting it the protection of the law?
>
> Secondly, Your Majesty will notice that the bill calls for an international lottery; this, as we understand it, includes other lands. Naturally our nearest neighbor and closest friend, the United States of America, will be the principal field of operation. Is there not danger of seriously affecting the pleasant, friendly relations now existing between Hawaii nei and the great Republic if we open here a refuge for the enemy she has just driven out with a great struggle? The leaders of the Louisiana lottery stand convicted in their own words of carrying on "a business reprobated by law, and contrary to public policy and good morals". If we permit this "business" we must expect a population of lawless character, whose presence will keep out those who would help to build up, on a solid foundation, a prosperous community, and our isolated position would make the situation harder for us than it has been for Louisiana.
>
> Finally: An honorable man can receive no greater insult than the offer of a bribe, and this proposed company offers just that to an honorable nation. They care nothing for Hawaii, except to make a convenience of her. So they bring a bribe having in it a semblance of benevolence to make it attractive, but a bribe pure and simple. They offer to buy the nation for a price, and we are asked to sell ourselves to a company of gamblers. As they have done elsewhere they expect to do here, to own the legislature and every purchasable power and individual. This it has been in other lands, it is the history of lottery companies, and we cannot expect our case to be exceptional.
>
> We cannot believe that the legislature will really accept this humiliating proposition, but if, dazzled for the moment by the seeming brilliancy of the offer, they do fail to recognize the fact

that it is only a bribe and pass the bill, it will then come before your majesty for signature. With your majesty then will lie the power to save the nation, for it cannot be possible that Hawaii's Queen will lend her honored name to so iniquitous a measure, thereby placing this nation before the nations of the world as one whose integrity can be bought and sold.

Your Majesty, we who make this plea before you are the wives, the mothers, and the sisters of the land we plead for our homes, for our children, for the nations honor. We pray you to pardon any thing which may have the semblance of unseemly warmth, and remember only that we come to you as loyal women who accept the nation's motto in its fullness, Ua mau ka ea o ka aina i ka pono.

The women closed with, "God save the queen" (underline is in original).

The legislature was fractured between three different parties and members shifted positions around a number of significant issues. Between the time of the introduction of the lottery bill and its final approval, a period of three and a half months, there were five different cabinets. Much of the jockeying revolved around the opium and lottery bills, although there were other important issues.

On the day the lottery bill was introduced, August 30, it was placed on the table. Nothing more happened until October 10 when a motion to postpone it indefinitely was defeated and it was referred to a select committee headed by Representative White. The cabinet headed by George N. Wilcox, which had assumed office on November 8, had publicly declared its opposition.

....But on January 10 (Tuesday), when several of the opponents of the bill were absent, Representative White brought in a report signed by five members of the committee recommending it passage with certain amendments.* [*It cannot be said that opponents of the bill were taken by surprise. On the preceding day, in response to a question by Rep. W.O.Smith, Rep. White had stated that the committee would probably report on Tuesday...] A motion to postpone indefinitely both the report and the bill was defeated (17 ayes, 20 noes, 14 absent), the report was adopted, and the bill passed its second reading .... On Wednesday [Jan. 11] the bill was up for third reading. Great excitement prevailed, the legislative hall being crowded with spectators. After a debate of several hours and after some amendments had been adopted, a motion to pass the bill was carried by a vote of 23 to 20.... (Kuykendall, 1967:579-80)

The issue now moved to the queen and her cabinet, but the next day the Wilcox cabinet was given a vote of no confidence and on January 13, 1893, it was replaced by a cabinet consisting of Samuel Parker, John F. Colburn, William Cornwell and Arthur P. Peterson, who advised the queen to sign both the lottery and the Chinese opium den bills, which she did, although it had been clearly established by the Supreme Court of the Kingdom that the right of the sovereign to veto was not limited in any way by the advice of the cabinet (7 Haw. 229). The next day Queen Liliuokalani made William White a Knight Commander of the Order of Kalakaua.

Some months after the overthrow of the monarchy in a written statement given to the person sent by the President of the United States to investigate that event, the deposed queen stated that Rep. White "watched his opportunity and railroaded the [opium and lottery] bills through the house" and that the "same day of their appointments [the new ministers] advised me to sign the opium and lottery bills....I had no option but to sign" (Blount, 1893:396).

THE OVERTHROW OF THE MONARCHY: 1893

On the same day the Queen desisted from her intention to promulgate a new constitution, one which would limit the franchise to her subjects (native born and naturalized) and increase the powers of the monarch. However, this was seen in some quarters as only a temporary delay. Some prominent *haole* businessmen and professionals, centering around the law offices of W. O. Smith, organized a Committee of Safety and began preparations to overthrow the monarchy. Marshal Wilson assured the Committee that he would not permit the Queen to proclaim a new constitution even if he had to lock her up, but the Committee proceeded with its plans (Kuykendall, 1967:592). It called upon the United States Minister to provide military protection because, "the public safety is menaced and lives and property are in peril" (Quoted in Blount, 1893:118). The Minister landed United States marines even before they were requested by the Committee and on January 17 the monarchy was overthrown.

The last resister was Marshal Wilson, who refused to surrender the police station to Major Soper of the Honolulu Rifles until visited by the members of the last cabinet with a copy of the queen's protest to the United States government and a signed order to surrender.

THE PROVISIONAL GOVERNMENT: 1893

On January 17 the Committee of Safety proclaimed the establishment of a Provisional Government headed by President Sanford B. Dole, with W. O. Smith as Attorney General. An Advisory Council of fourteen members constituted the legislature. Smith immediately appointed F. W. Wundenberg as Marshal of the Provisional Government, though later that year he would be succeeded by Edward G. Hitchcock. A delegation immediately left for Washington, D.C., to seek a speedy annexation of the islands by the United States government.

ACT 21

Act 21 then replaced all the repealed legislation with a new encompassing statute. It began by targeting lotteries. Section 1 prohibited setting up, maintaining or conducting a lottery or assisting in such. Section 2 provided a detailed definition of a "lottery scheme" whether it be called "a lottery, raffle, Che fa, pakapio, a gift enterprise or by whatever name." Section 3 prohibited any person from buying, giving, receiving, possessing or dealing with in any manner any ticket or other paper or instrument purporting to represent an interest in a lottery.

Section 6 took up table games. It prohibited any person as owner or employee from operating any "banking or percentage game played with cards, dice or any device," specifically including "faro, monte, roulette, tan and fan tan." It also prohibited any betting, side betting, or even being present at such a game. Section 6 prohibited three card monte, the shell game, and slight of hand or fortune telling games whereby any person was defrauded.

Section 9 prohibited any person from permitting his building or vessel to be used for any of the above activities. Sections 7 and 8 provided for compulsory testimony, while granting immunity from prosecution to persons so compelled. Section 4 provided for forfeiture to the government of "[a]ll moneys or property offered for sale or distribution in violation of any of the prohibitions" of the act, though this was aimed primarily at lotteries.

All the prohibited acts were defined as misdemeanors punishable by "a fine of not more than one thousand dollars, or imprisonment at hard labor not exceeding one year" (Sec. 10). All were triable by a District Magistrate (Sec. 11).

Act 21 and the retained sections 6 through 8 of Chapter 39 would remain the gambling laws of the period of the republic and after annexation by the United States (Republic, 1897: Ch. 39; Territory, 1905: Ch. 217).

While these changes in the laws were taking place attorneys Alfred Hartwell and Arthur Peterson sought to raise technical issues in defense of Chinese convicted under Chapter 41 of 1886. Ah Hum had been convicted in the Honolulu Police Court in July, 1892, of being involved in the operation of a *Che fa* lottery. He appealed to the First Circuit Court and in February, 1893, Hartwell and Peterson moved to dismiss the charge on the ground "that there is no law in force under which he can be prosecuted" because the enactment of "An Act granting a franchise to establish and maintain a lottery" on January 13, 1893, had "repealed by implication" Chapter 41 of 1886. Circuit Judge Whiting denied the motion and the defendant appealed to the Supreme Court, where the case was argued April 5. In an opinion written by Chief Justice Judd, the Supreme Court held that it was unnecessary to consider any argument about "repeal by implication" because the Provisional Government had explicitly repealed Chapter 41 of 1886 on March 7 in Act 21. The Court then ruled that Section 12 of Act 21, the saving clause, governed and returned the case to the First Circuit Court for trial. (*The Queen v. Ah Hum*, 9 Haw. 97; Supreme Court Criminal Case No. 1657, Archives of Hawaii).

THE REPUBLIC OF HAWAII

When the Provisional Government was unsuccessful in bringing about the immediate annexation of the islands by the United States it called for the election of delegates to a convention to adopt a constitution for "The Republic of Hawaii." The delegates were elected by an extremely limited electorate which included even persons of European extraction who were not citizens, while excluding Hawaiians who refused to take an oath of loyalty to the new regime and all Chinese and Japanese. Thus the Republic of Hawaii came into existence in 1894. Edward G. Hitchcock continued as Marshal, a position he held until the next year when he was replaced by Arthur M. Brown.

Marshal Hitchcock intensified the campaign against gambling, or more especially the lottery operations of the Chinese in Honolulu. As shown in Table 1, the number of convictions in the republic in 1894-95 was double that of 1892-93 and, as shown in Table 3, this increase was most marked among the Chinese in Honolulu, with some numerical increase for the Japanese and Hawaiians and again almost no convictions of Portuguese or "Other Foreigners." Twenty of the persons convicted on Oahu in 1894-95 were given prison sentences, twelve of whom were Hawaiian and all of whom had been convicted for *Che fa* operations (Oahu Prison, 1885-98). Chief Justice Judd took

cognizance of the crackdown on the Chinese lotteries in his 1896 report to the legislature: "In Honolulu alone, the arrests [were] 1,593 as against 587 for the former period, an increase of 1,006, or nearly 43 percent of the whole number throughout the islands." However, he also felt compelled to explain why Chinese and Japanese were so prone to conviction in stark contrast to the Portuguese and the *haole*: "The forms of gambling at which our laws are directed are those which are prevalent amongst the Asiatics, and it is [thus] among them that the increase of convictions have mainly occurred" (Republic, 1896:9).

The same general pattern would continue under Marshal Brown in 1896-97 and total convictions would increase another 22 percent (Table 1). In this period there is another publicized report of a police raid on a gambling house which illustrates how difficult it had become to conduct a successful raid, but also shows that there were Chinese in the community who were cooperating with the police in their efforts to suppress the gambling houses.

> One of the cleverest raids ever made on a gambling den in this city was made by Captain Parker and a squad of five men yesterday and as a result 19 Celestials are now in the toils of the law, caught red-handed.
>
> For some time the police have been aware of a fan tan and opium joint in operation in the neighborhood of the new Chinese theater. Just where to look for it they did not know. An officer, placed and watching became suspicious of a two story building in the rear of the Chinese theater and a close watch was placed on it. To be sure a game was going on inside was one thing, to catch the players in the act another.
>
> The assistance of three Chinese confederates was secured by the officers and yesterday afternoon armed with sledge hammers and crowbars a swoop was made on the building. It is enclosed by a high board fence and built over the water. The place was surrounded and a combined rush was made by the officers headed by Captain Parker.
>
> The fence was broken down and the two doors heavily barred and the only avenues of escape were opened after being nearly battered to pieces. The confederates on the inside contrived to hamper the players in the use of the trap doors made to secrete the implements of the game and opium smoking outfits and the police controlled the only avenues of escape, catching the Pakes like rats in a trap. Two of the men were caught smoking opium and the others playing fan tan. They were placed under guard and marched to the police station.
>
> The nineteen prisoners were soon released on bonds supplied by countrymen in the business (*Advertiser*, Dec, 10, 1897).

However, Chief Justice Judd faced a more difficult task when he reported to the legislature in early 1898. The Republic of Hawaii was negotiating a treaty of annexation with the United States. On the one hand, Judd had to portray a picture of the government continuing to pursue an aggressive policy against organized gambling, especially lotteries, which was highlighted by the convictions of Chinese. On the other hand, he had to inform the world that this lawlessness of the Chinese did not constitute a major threat to public order. His effort to balance the two is seen in the following from his report: "The Chinese head the list, 17.36 percent of their whole number having been convicted [of some offense]," but "the larger part of the offenses recorded against that race are the *minor* ones of *gambling* and possession of *opium*" (italics added) (Republic, 1898:10).[3]

ANNEXATION

A treaty of annexation was negotiated and approved in an unusual procedure by the Congress of the United States. The formal "transfer of sovereignty" took place on August 12, 1898. However, the formal reorganization of the government of the Republic into the government of the Territory of Hawaii would not be accomplished until the passage of the Organic Act by the United States Congress in 1900.

During the interim Marshal Brown continued his past enforcement policies and the established pattern continued through 1898-99 (See Tables 1 and 3). The obvious discrimination against the Chinese is accentuated even more when one converts the numbers into convictions per 1,000 adult males, as shown in Table 4. In 1898-99 this rate was 55.0 for the Chinese, while the next highest was 16.7 (the Hawaiians). In 1899 a huge buildup occurred in the numbers of adult Japanese males brought into Hawaii, so even though the number of convictions was substantial their rate per 1,000 fell to 14.1. The rates for "Other Foreigners" and the Portuguese were 4.2 and 1.4, respectively.

Table 4 Number of Convictions per 1,000 Adult Males by Ethnicity, 1886-1900*

Year	Chinese	Japanese	Hawaiian	Portuguese	Other	Total
1886-7	8.2	0.4	4.6	0.5	4.6	5.1
1888-9	17.3	6.9	5.7	0.2	0.8	9.0
1890-1	8.5	14.6	6.9	0.2	2.3	8.1
1892-3	10.8	24.3	6.1	2.2	1.6	11.7
1894-5	35.1	29.0	8.2	1.2	4.6	21.7
1896-7	45.3	24.5	9.8	1.0	6.6	24.3
1898-9	55.0	14.1	16.7	1.4	4.2	23.7
1900	46.6	12.1	17.4		2.4**	18.6

* Each biennium has been averaged to produce the average annual rate for each two-year period.
**For 1900, it is not possible to separate the Portuguese from the Other category.
Source: *Biennial Reports of the Chief Justice to the Legislature.*

This did not mean that *haole* gamblers were never arrested, but what evidence there is suggests that they were rarely arrested unless they were trying to conduct a commercial operation. Thus in December, 1898, *The Hawaiian Star* reported "A Sensational Arrest." The customs officers had alerted the police that a roulette table had been passed through addressed to H.D. Rivers and the police had been on the lookout for it to be used. Finally they struck.

> The place of the arrest was the upstairs room of the Hotel street entrance to Fowler's yard. This is immediately over the Chinese restaurant at that place. The room is nicely fitted up and carries gas lights. It has been known for some time that there was a roulette table in the neighborhood and the particular room was suspected.
>
> At [11:00 o'clock] last night Deputy Marshal Charles Chillingworth, Captain Kanae and Patrolman Nigel Jackson went to the place. They figured that it was nearly time for the saloons to close and there would probably be some "game in the trap." Gardner was met at the door. Seeing the officers he touched an alarm button, but was too late. The police pushed him aside and rushed into the room.
>
> [H.D. Rivers, L.H. Dee, A. Buchanan and Gardner] were the sole occupants of the room. They were arrested. The roulette table was taken charge of. With it were several hundred counters and some $40 in cash. A loaded revolver was in one of the drawers.

> The gaming table was a cheap affair. A Frenchman who examined it this morning said it could be bought in Europe for five francs, but that in Denver it would cost $100. With the cloth and "chips" the outfit is complete. It does not have the appearance of being much used.
>
> The owner of the outfit is known to the authorities, and they will endeavor to give him the worst of the deal. Little attention will be given to the others (*The Hawaiian Star*, Dec. 14, 1898).

The editor of the *Star* seemed quite satisfied that only one haole would be vigorously prosecuted, but he called for a continuation of the campaign against gambling even though it was "a vice innate."

> The capture of a complete gambling outfit before it has gone very far in its nefarious career is satisfactory. There is nothing worse for a city than gambling dens, be they fine in outfits or be they low hovels. The harm that has been done by them, the ruin that they have brought to the youth of generation after generation in this world's history is incalculable.
>
> Gambling is a vice innate in human nature. We find the savage gambling his shells and food away. The Greek loved it, the Roman loved it, it was the vice of Queen Anne's day, and it is the vice of the present. Laws against gambling have been enacted in every civilized language, and yet it is carried on in spite of what the law may say.
>
> But however innate the vice may be, there is no doubt in any one's mind that the state should protect its weaker citizens against its baleful influence. It is a plague incarnate and no stone should be left unturned to put a stop to what are known in Europe and America as gambling hells (*The Hawaiian Star*, Dec. 14, 1898).

THE ORGANIC ACT: LOTTERIES PROHIBITED

The government of the Territory of Hawaii was officially reorganized with the passage by the United States Congress of "An Act to Provide a Government for the Territory of Hawaii" (The Organic Act), which received its final approval on April 30, 1900. Section 55, entitled "Legislative Power," specified what the Territorial legislature could do and what it could not do. The latter included, "nor shall any lottery or sale of lottery tickets be allowed." The

Congress had reaffirmed the grievance against the Lottery Bill as it had served to legitimate the overthrow of the monarchy. Marshal Arthur M. Brown now became the High Sheriff of the Territory.

As shown in Table 1, the overall enforcement effort in the Territory remained at the same high level as in 1898-99, but it shifted even more to Oahu, which accounted for 44 percent of the convictions (Table 2), with 63 percent of those convicted there being Chinese (Table 3). For the Territory as a whole, over half of those convicted were Chinese, almost a third were Japanese and about an eighth were Hawaiian. The rate per thousand in 1900 was 47 for the Chinese, 17 for the Hawaiians and 12 for the Japanese (Table 4). By contrast, The Portuguese and "Other Foreigners" made up about two percent of the convictions and had a combined rate per thousand of 2.4. Chief Justice Walter F. Frear, now an appointee of the President of the United States, in his 1901 report to the legislature, commented wryly, "Probably a smaller proportion of the actual gambling is brought before the courts in the case of other races than is the case of Asiatics and Hawaiians" (Territory, 1901:xxxi).

SERENDIPITY

While this research set out to end with 1900, a few items located in the process ought to be included to facilitate any person who wishes to extend the time period. The first makes clear that substantial members of the Chinese community also wished to see an end to the gambling houses. The second presents the High Sheriff's explanation about the difficulty of eliminating the lottery operations.

In March, 1901, Hee Feart, a very substantial rice planter on Kauai, whose main operation employed 150 laborers, sought to obtain "a commission to make arrests of gambling without first obtaining consent of the Sheriff [of Kauai] and to serve without pay." He sought this because gambling "makes his as well as others' laborers idle and they do not work regularly, causing loss," and because (he alleged) the law enforcers, with the one exception of W.H. Rice, Jr., had been bribed by a hui, headed by one Tai Lan, to ignore their gambling houses at Hanalei, Kapaa, Kapaia, Koloa and Hanapepe. The bribes were paid monthly; the Sheriff got $1,500, the deputies $150 to $350, and the policemen five dollars and up. Hee Feart also alleged that the police had conspired with the hui to falsely convict three Chinese planters, Lee Che Ahu, Lee Quon and Kum Sin, of assault and battery with a deadly weapon when the three tried to break up the gambling at Hanalei (Archives of Hawaii, FO & Ex, Doc. 94). It is not known who submitted this report for Hee to the Governor's office, but a notation makes it clear that the informant's name was to be protected.

In the second document High Sheriff Brown is responding to Governor Dole to complaints about gambling, including one from Ah Lum. Now the courts, the juries and the gamblers' attorneys had become obstacles to the successful prosecution of the lotteries.

> In reply I beg to state that certain lotteries among the Chinese, known as Pakapio, are being maintained at Waipahu. I am so informed and so believe, but to no greater extent than has existed for the last two years.
>
> Prosecutions for Che Fa or Pakapio tickets in possession are useless. There are no tickets used in Pakapio. The memorandum used in Pakapio the courts have ruled does not represent an "interest in or depending upon the event of a lottery."
>
> Only the agents come in contact with the Bankers, and it is next to impossible to secure convictions against the latter. To convict the Agents it is necessary to hire informers whose testimony the Courts and Juries look upon with doubt and almost invariably acquit the defendants.
>
> Ordinary gambling games where two or more persons get together and play games at which money is lost or won are easily broken up and convictions obtained. Chinese lotteries are conducted by the advice of Attorneys, in such a way that convictions are next to impossible.
>
> If any person will furnish information other than hearsay I shall be only too willing to prosecute, and if AH LUM can testify to any banking game or lottery now being carried on, or that has been carried on, I will do my best to secure a conviction (Brown to Dole, Sept. 16, 1892, FO & Ex, AH).

Not long after this Brown would conduct a raid upon a gambling operation in Waipahu, in the course of which a Chinese gambler was shot and killed. The dead man never would be identified and the precise circumstances about his death would remain a mystery (Chung, 1960:98-99).

SUMMARY

With the end of the Kapu system the Kingdom was subjected to a new system of morality brought by the Christian Missionaries. These missionaries

saw gambling as an act which was clearly immoral, possibly sinful, and contrary to the economic development of the kingdom. Laws were thus enacted to suppress gambling in all its forms. The arrival of larger numbers of single Chinese males, beginning in 1852, intensified the gambling problem generally, but also brought a new threat -- the Chinese lotteries. This problem became particularly acute when the gambling of the Chinese became a major issue in the willingness of the Japanese government to permit Japanese contract laborers to come to Hawaii. New statutes were passed and a vigorous enforcement effort was instituted against the Chinese gamblers. This campaign included Hawaiians as a target, especially if they were involved in lotteries, either Chinese or their own. It was extended to the Japanese when it became clear that their plantation gambling had become organized by criminal gangs. Throughout the period enforcement efforts were directed toward haoles only when there was evidence of a commercial gambling enterprise. The evidence of discriminatory enforcement, prosecution and conviction is abundant. The symbolism which the lottery issue had acquired became very clear when the Queen's approval of a bill which would have moved the Louisiana Lottery to Hawaii became one of the primary public justifications of the annexationists and the United States Minister to Hawaii for the overthrow of the monarchy. This action was reaffirmed after annexation when the Congress of the United States denied to the legislature of the Territory any power to legalize a lottery.

Hopefully others will interest themselves in continuing this research through the territorial period and into the present statehood era. It is not clear whether the present gambling situation in Hawaii is one of ambivalence or calculated compartmentalization. It is widely practiced in several forms, and these forms are not only condoned but even encouraged. "Everybody gambles." However, there is also widespread support for the proposition that those forms of gambling which would be subject to the control of outsiders should be prohibited. Many believe that these forms are great fun and ought to be available -- but in Las Vegas. However, the issues of a state lottery and bingo games and raffles by charitable organizations are still very much alive.

NOTES

1. I wish to thank Professor Harry V. Ball for his encouragement and assistance in the execution of this research.

2. "Mr. T.E.E" is now known to have been T.E. Evans.

3. For a detailed discussion of the law and opium in 19th century Hawaii, see Lim-Chong and Ball, 1992.

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